CLAIMS
FIXING THEIR VALUES

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CLAIMS

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CHAPTER I

INTRODUCTION

1. Qualifications for successful claim work.
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1. Qualifications for successful claim work.

A little knowledge, it has often been said, is a dangerous thing. It has likewise been said that a man who is his own lawyer has a fool for a client. As a matter of fact, these proverbs, like all others, contain a half truth and a half error. Proverbs in fact never lead to anything except to make a man dissatisfied with what he is doing. The purpose of this work is to provide those for whom it is designed with a little knowledge that shall not be dangerous. Claim work is a field so closely related to the law that the pursuit of the one profession frequently leads to the other with little apparent effort. For certain of the same qualifications make for success in both. Our purpose here is to equip the claim adjuster with the information and knowledge that will assist in

making him efficient in the performance of his duties. Let it be understood that the work of a claim agent is as varied and requires as ready and thorough a knowledge of human nature as that of any other profession. As he is so closely allied with the law, he must have a fair legal equipment. He must have not a little medical knowledge; not a little knowledge of the weaknesses of human nature.

2. The basis and valuation of a claim.

An honorable man will not stoop to anything, even for his bread and butter, to defraud a claimant. At the same time he is bound to know that there are many who make their living by preying on others and the corporation with supposedly inexhaustible coffers has ever been considered legitimate prey. A claim agent or adjuster may be termed or defined briefly a professional measurer of damages. The proportion of all litigation devoted to claims for damages, arising out of injuries inflicted through lack of care, is so great that the courts and the litigants have come to regard it as an incubus, or as a pursuing "Nemesis" never to be shaken off and ever increasing in size. One of the most difficult tasks that can be attempted is to decide in dollars and cents what shall be paid for the loss and suffering incident to the infliction of physical injuries. Modern law is filled with attempts to set arbitrary standards for the value of a broken leg, a dislocated arm, a bruised foot. But added to this, is that uncertain element known as damages for physical suffering. We shall attempt to make definite as far as possible those factors that enter into the valuation of a claimant's loss. When a person has been injured through negligence, has been harmed by his neighbor in such a way that the law makes him accountable to pay for

it, there is one general principle that controls. The person injured is entitled to fair compensation—no more—no less. He is entitled to have his loss made good. And this compensation is measured by the various financial and other losses that have come to the claimant through the neglect of which he complains.

3. The frame of mind in which a claim should be approached.

It is needless to say that none of the activities of life can be successfully conducted without some knowledge of human nature. But in claim work, this is the adjuster's largest asset. He is valueless unless the lines of the physiognomy, the play of the features, and the general demeanor tell him instantly their story of insincerity or sincerity. A claim that is sincerely presented and honestly set forth is worthy of a hearing and fair treatment. Aside from the legal rights of the claimant, his moral rights should receive, in such a case, proper consideration even though his legal rights are slight. It is only through a knowledge of the motives that influence our fellow men that an adjuster can deal successfully with his problems. He must see through the insinuating manner, the appeal to the emotions, the glossing over of damaging facts. Of the various phases of the problems that human nature presents, we shall treat under specific frauds. It is necessary only, by way of introduction, to suggest what a really large part of the adjuster's equipment a knowledge of human nature forms. Second only to this is the adjuster's ability to deal with facts in an impartial way. It is our tendency to apply to all our hurts a salve of self-deceit, which sooths our vanity and leads us to minimize the dangers that face us. In claim work, this is a tendency that can lead only to defeat. A man must be able to appraise truly the

facts that are against him and to appreciate at their full value, and only at their full value, the facts that are in his favor. If he exaggerates his own side and depreciates his opponent's side, he is doomed to failure. Besides this, his investigation of facts forms the basis of the action, either of his superiors, or in the more extreme cases, of his attorneys in court, and the slight exaggeration that he may have been guilty of to make his case look better is carried down the line, increasing in intensity as it goes. It may involve the loss of litigation and the payment of unfounded claims.

4. Investigation of the facts. Thoroughness the key-note.

Before the facts can be weighed, they must be investigated. This investigation cannot be made too thorough. It would be well to have a more or less stereotyped order of procedure that one might follow mechanically until the general field of investigation had been covered, after which the adjuster or investigator should supplement this information by anything that might seem important. Let us, by way of introduction, dwell only on this fact. The investigation must be thorough; it must cover all of the facts of the occurrence, however trivial. No advantage results to anyone by a biased statement of facts or by coloring them to make them look more favorable to his own side of the case. If an adjuster knows the moment he appears upon the scene that his motorman was intoxicated, he is bound to include that in his statement of facts. To gloss it over by saying that he smelled of liquor but was capable of managing a car carefully, is to invite disaster. To include the statements of three by-standers that a bell was rung and to exclude the statement of three others who said that the bell was not rung, is equally to invite disaster.

5. Treatment of the facts.

Let us recall, however, that it is our purpose to consider all of the facts and circumstances that bear upon the value of a claim for damages based upon personal injuries. These facts, circumstances, or factors are extremely varied, and predominance must sometimes be given to one and sometimes to another. We have insisted first upon absolute sincerity in the treatment of the facts under investigation—of the necessity of avoiding self-deceit in any degree. The first consideration of anyone who seeks to determine the value of a claim is to become acquainted with the facts. Too thorough an investigation of the facts can scarcely be made. They must be sifted and arranged and verified by proof so that when an investigator has presented a statement of facts he has not only given the circumstances of the case, but he has shown by citing the particular witnesses whom he can produce to prove each individual fact, how the case is to be proved. So that the first and most important factor to be considered is what are the facts and circumstances concerning the accident. Again, liability for negligence arises from injury to persons and damage to property. So far as the facts are concerned, the investigation in each case is much the same. The facts must be fully known and investigated.

6. The question of liability. Its determination.

The facts having been made clear, the question immediately arises, "Who, if anyone, is liable to pay for the injuries done?" This is an inquiry more or less of a legal nature. To solve it requires a knowledge of the law of negligence. This is a matter that is open to the investigation of any man of intelligence. It is no more advisable to run with every occurrence of any

kind to the lawyer than it is necessary to run to the doctor every time one stubs his toe. The claim department necessarily has to determine for itself in most cases whether or not it is going to pay and if so, how much. This it does almost invariably without consulting its attorney. What we are dealing with at the present time is the appraisement of the value of a claim with or without reference to the possibility of legal enforcement.

7. Various factors that determine the value of the claim.

Having considered the question of liability and of the necessity of a knowledge of the law of negligence, we must consider certain factors that modify liability—those that constitute a defense to liability. First of these is the fact that the claimant has contributed to his own injuries. The second is that the injuries for which he now claims compensation are identical in character with injuries which existed prior to the occurrence of the accident in question. The third is the fact that the claim shows evidence of fraud. For, if a claim is insincere or based upon deceit, it is not only unworthy of compensation; but it often presents a case in which there is a duty to punish the offender. Even after it has been decided that liability exists for damages inflicted upon a claimant, we are still confronted with the question of how to determine the money value of the claim. This is determined by numerous facts. We must consider how seriously he has been injuried; the facts revealed by the physical examination; the permanent or other character of his injuries; the probable duration of his disability; whether it will affect him for the remainder of his life or only for a short period; whether the injury may lead to more serious consequences or not; whether the accident has produced new

injuries or has simply aggravated previous in juries, and finally whether his statement of his injuries coincides with the actual facts. These are all that may be termed primary or essential facts. They form a part of the claimant's demand, but the amount that may have been found due by a consideration of the facts heretofore examined may be modified by the inquiry whether or not the life of the claimant has already been shortened by various diseased conditions, such as tuberculosis, nervous disorders, cancer, inherited tendencies, hernia, alcoholism, advanced age and the like. On the other hand, this amount may be modified in favor of the claimant, that is to say, enhanced, by the fact that his vocation was an important and profitable one; by the fact that he had a great earning power; that he was able to maintain a large family, and in the case of female claimants, that the injury occurred during the menopause period or even during pregnancy. We have enumerated up to this point practically all of the factors that bear upon the actual value of the claim. We are bound, however, to weigh certain factors that affect more or less the amount that a defendant is willing or may be compelled to pay in settlement. Under these may be grouped the attitude assumed by the attending physician; the reputation, character and ability of claimant's counsel; the damages asked by the claimant or his counsel; the defendant company's general policy toward the public or toward injured employees. Under this last head we shall discuss particularly a new phase of legal development that affects the value of a claim based upon injuries to employees; that is to say, the employers' liability laws of the various states.

The facts having been ascertained and all of those affecting values having been considered, we shall comment upon the character and strength of the evidence

by which these facts may be proved. We must discuss herein the character of the witnesses; the number of witnesses; the coherence of their statements; the likelihood that the claimant's case might go to the jury; the strength of the claimant's own statement of the occurrence; the strength and character of the medical testimony. We must likewise consider that which is the ultimate destiny of every claim—the possible litigation involving the determination by a court and jury of the value of the claim. Finally, we shall review the subject as a whole in order to indicate if possible, the general principles that should control our conduct in determining the value of a claim.

CHAPTER II

MISHAP, LIABILITY OR NON-LIABILITY

8. Liability not the result of every accident.

The happening of an accident does not mean necessarily that a defendant is liable to pay damages. Nor is it always certain that a defendant will not feel obliged to pay damages, although the law does not compel him to. It is a well known fact that almost two-thirds of all of the modern field of law deals with the question of liability for harm inflicted in accidents, in railway collisions, in contact with electric wires, by moving vehicles, by boiler explosions and a thousand other casualties that are of daily occurrence. The facts in connection with any conceivable injury being

known, the task of those entrusted with the duty of adjusting the claims arising from it, is to discover whether the facts fall within the general principles that constitute a claim enforcible by legal proceedings or litigation. It is not to be supposed that one must be a profound student of the law in order to determine whether or not a claimant should be paid money for the injuries sustained. There are certain broad general tests that enable the majority of adjusters to determine offhand whether or not a claim falls within the class for which money should be paid. It is proposed to review here briefly and without technical language, certain of these broad general tests that may be of assistance to adjusters.

9. Cases where liability is certain.

First of all, let us assume that one company controls all of the railway traffic within a given city. Some of the tracks of this company intersect each other at right angles. That is to say, the cars upon Tenth Street must move across the tracks on which the Sixth Avenue cars are running. In the course of human events, it is almost certain that at some time or other, one of the cars on Tenth Street is going to collide with a car on Sixth Avenue. This is because of a certain fatality, in all activities controlled by human beings, that makes it impossible to prevent misadventure when human beings are the agencies in control. A motorman may be on his guard 99 times in crossing Sixth Avenue, and in the 100th instance, for anyone of a hundred reasons, his vigilance abates and the Tenth Street and Sixth Avenue cars run into each other, and several passengers are injured. In a case of this sort, the most casual observer knows that there is almost no escape for the defendant railway company, because it

has now become a principle of law that a presumption of negligence arises from the mere happening of a collision between railway cars, so that an adjuster's work narrows itself down to adjusting the claims as reasonably as possible, consistent with fair dealing, humanity, and his duty to his employer.

10. Fixing responsibility.

But let us first of all take a glance at our position. An accident happens. Someone is hurt, and we are desired to fix the responsibility and adjust the amount, if any, that should be paid by the party in fault. If a passenger upon a railway car is hurt, the railway company may or may not be bound to compensate him for his injuries. What is it that determines whether we shall pay or whether we shall not pay? It is the existence or non-existence of negligence. And the test of this is whether the railway company has been or has not been at fault. The term "at fault" in modern law really means "guilty of negligence." We therefore must be prepared to say what is negligence.

11. Negligence. Tests of fault or negligence.

What constitutes being at fault or guilty of negligence? A great authority has said that negligence is want of care according to the circumstances; and want of care means want of that diligence or vigilance which any common sense man would have employed under like circumstances. For example, if a conductor saw a passenger about to alight from his car and gave the signal to the motorman to start the car before the passenger had alighted, a jury would say at once that the conductor was not using as much common sense or vigilance as an ordinary man would have used under those circumstances. It will be seen at once that this

definition is very broad and in many cases not easy to apply, but for all that, it is a reasonably simple matter for an adjuster to reach an approximation of what an ordinary man would have done under any given circumstances. It is easy to say that a prudent man would not drive across a track before a rapidly moving car when it was only five feet distant from him. We might say the same when it was 10 feet distant; when it was 15 feet or even 25 feet distant. But we should be compelled to admit, if a vehicle were struck while attempting to cross fully 150 feet in front of a moving car that the car would have to move with lightning-like rapidity to strike him, which might give rise to two different answers to the adjuster's question of liability or non-liability. In the first place, if mathematics would demonstrate that no car moving at any conceivable rate of speed could strike the vehicle before it crossed, it would be evident that the driver's story was untrue, in which event, the decision of the adjuster would be non-liability. On the other hand, if careful calculations disclosed that it was within the bounds of possibility that the car could travel 150 feet and strike the vehicle, which would in a manner confirm the claimant's story, the adjuster would have to decide that there was at least a possibility of liability.

12. Determination of liability.

So that we reach a more or less reasonable test in a general way of whether or not the railway company or other defendant could, by any possibility, be charged with liability if an accident happened. The first test to be applied is: has any official or employee of the company been guilty of want of care according to the circumstances? In the case of common carriers, such as railway or railroad companies there is a very broad

general duty laid upon the company to carry its passengers safely. The company, for a payment of money, agrees to transport the passenger from one place to another and it is a part of its agreement and undertaking that it shall do it safely. In other words, that in the course of the journey, it will do nothing careless on its own part to produce harm to the passenger it has undertaken to carry. The carrier is not an insurer that nothing will happen to injure the passenger; it is not bound to foresee, for example, that a team will suddenly dart out from a side street and injure a score of passengers, but it is bound to take reasonable precautions against dangers that it could avoid, or that could be avoided by the exercise of care.

13. Duties and their violation.

Many of the facts are so broad and occur so frequently that they have become almost as necessary a part of the law as breathing is a necessary part of life. Cities, it is well known, have intersecting streets, with cars running on both sets of streets. The duty of a railway company, for example, under those circumstances and the duty in fact of all drivers or conductors of vehicles, is fairly well defined. It is possible for one in charge of a vehicle to scent danger as soon as he reaches the house line of an intersecting street. He is bound to look in both directions in search of possible danger before attempting to cross, and if a danger suddenly presents itself, while he is more or less exempt from any stringent duty, yet he is bound to use ordinary care. Right angle collisions form a large portion of accidents through which injuries occur, resulting in damage claims. The question has been in litigation so often that the duties of the parties involved are more or less understood and fairly easy to ascertain.

14. From what has the injury resulted?

The first broad and general test that is of importance to the investigator or to the adjuster where the claimant has been injured in a collision between vehicles, by the action of machinery, or in explosions due to the failure of any machinery used to promote human activity, is to ascertain whether the injury is a direct result of a defect in machinery or of neglect on the part of those who have had charge of it. If the claimant is hurt because of a latent defect produced in the manufacture of the instrument causing the injury, as for example, a boiler, the question is opened up at once as to who must bear the loss. In normal cases, where the car, vehicle, machinery or other object has not been in use for an extremely long period, the failure of any part to perform its functions, may or may not be an indication of neglect or negligence on the part of the manufacturer. Suppose that an electric car on its first trip after delivery from the shops of the manufacturer, breaks a wheel and injures several passengers. If the wheel breaks because of a defect in its manufacture, which could have been detected by the manufacturer but not very readily by the railway company, the responsibility may in many or perhaps in the majority of cases be thrown back upon the manufacturer. Therefore, the first broad test as we have already suggested that the adjuster is faced with, is whether or not the injury has been produced rather by a failure of apparatus than by the neglect of his own workmen, agents or employees. If he decides that the machinery has been faultily constructed, it is proper that he should attempt to lay the responsibility at the door of the proper person, namely, the manufacturer. If, on the other hand, he finds that the apparatus has failed

because the agents or employees of his employer have failed to perform their duty, have needlessly subjected the material to a strain for which it was never intended, have failed to foresee an avoidable danger, he must conclude that the situation is one that he personally must solve. He then has eliminated the possibility of anyone but himself or his employer being liable for the injuries to the claimant. His general proposition then is, what is the precise act of negligence or failure of duty that produced the injury. He must analyze the facts in order to determine what is the immediate and producing cause of the accident or occurrence that resulted in the injury. If the accident is a collision he must know if the motorman, for example, failed to take the precautions required by law. If he did not, he is faced with the prospect of paying a damage claim. The precautions that the driver of a vehicle is bound legally to take, are of a nature that enable any common sense individual to say in a general way whether or not the motorman has been remiss. These principles can only be indicated in a very general way here, as this is not a treatise upon the subject known as "The Law of Negligence." Accidents may be due to carelessness of the motorman, to failure to see on the track what he should have seen; to failure to warn pedestrians or other vehicles of his approach; to operating a car at a high rate of speed in crowded streets, where vehicles or pedestrians are lawfully present. The motorman may see no passengers at an intersecting street, and without any precautions whatever, attempt to go across, regardless of other vehicles approaching. These facts are susceptible of infinite variations. If a boiler explodes the fact that the boiler had no safety valve, that its shell was known to be weak, and that it was nevertheless subjected to an enormous pressure, indicates fault on

the part of those who own or control or operate the boiler. In the case of a railway accident the disregard by the engineer of signals; the disobedience of speed regulations; the neglect to see if a switch is open; all indicate in a broad way the general kinds of what might almost be termed wanton negligence.

15. Definitions.

Let us proceed now to actual doctrines of negligence, and review as briefly as possible the principal situations that may arise. It has already been seen that the law with which we are concerned is the law of negligence. The definition that has been given that negligence is the want of that care which men of common sense and common prudence exercise in the business of life is a practical statement to which all the courts of the United States would subscribe. This definition may be broken up so that the necessary facts that enter into a case of negligence may be determined. For example, negligence which entitles a claimant to bring an action must present three elements. They are, first, that a duty is owing by the defendant to the plaintiff. Second, that the defendant has not performed that duty. Third, that the claimant has been injured by the non-performance or non-observance of the duty already owed by the defendant.

16. When does a person owe a duty to another?

These duties can best be illustrated by reference to concrete cases. Every person who undertakes a business in which the public is concerned is bound to conduct the business with reasonable care; and if by reason of his failure to use such care another person is injured, the person causing the injury is liable to make the damage good. An unusual case of how far this

liability to use care or to observe a duty extends is a case in which disease was contracted. A man who had two children afflicted with whooping cough took them to a boarding house where his children infected other children in the house, including a child of the claimant or plaintiff. It was decided that a person who knowingly takes children afflicted with a contagious disease to a place where others might contract the disease, is guilty of negligence and liable for damages. Negligence consists not only of doing acts that one should not do, but also of omitting to do acts that one should do. The case just cited is in a sense an instance of an omission to do something. The claimant should have disclosed the fact that his children were diseased so that others might be warned. The ordinary care that people are bound to use may, of course, be modified by circumstances. Ordinarily, a trespasser is a person toward whom no duty is owing by a person whom he aggrieves, but if the latter injures the trespasser through absolute disregard of consequences implying gross negligence, even a trespasser has a right to recover. For example, if a farmer saw a tramp lying asleep in his barn, he would certainly be liable if he urged a savage dog to attack the sleeping trespasser. It may be mentioned here that standards of care are sometimes prescribed by statutes. It is generally held that if a statute makes failure to observe its provisions, negligence, mere violation of the statute, gives rise to an action. Little need be said of wanton negligence or reckless acts or conduct. They almost invariably give rise to an action. Wanton or willful negligence is generally disclosed when the person doing the act is absolutely regardless of consequences. Normally, no one is liable for the acts of third persons over whom he has no control. A street railway company,

for example, is not liable for injuries caused by the acts of rioters.

17. Care must be in proportion to the danger.

Care is required of persons according to the danger arising from their activities. A person who stores dynamite on his premises must take more precautions than a person who stores wheat. The same rule holds true in the case of other substances, the danger of which is manifest. Electricity is such a dangerous substance. Gun-powder, water stored in a reservoir, and other things of like character, increase the duty of care required of the owner.

18. Attractive dangers.

A particular class of liability arises from what may be considered attractive dangers. This may best be illustrated by reference to an actual case. The turn-table of a railroad stood in a public place, although on its own premises, in such a position as to attract young children to play upon it. Injury resulted to the children playing on the turn-table through the negligence of the railroad employees. It was decided that the railroad company was liable for the injuries to the children.

19. Lawful acts done in an unlawful manner.

Liability arises also from conducting a perfectly lawful business in a negligent or improper manner. Suppose that a person who manufactures ladders puts them upon the market for use constructed in so negligent a manner that it would obviously endanger the life or limb of anyone using them. He is liable to anyone into whose hands one of his ladders may come for use, whether he had any contract with the person using

it or not. The general principle applicable to manufacturers of articles is that the manufacturer is liable to the purchaser for defective materials or for want of care and skill in the construction. But it has been decided that if a boiler exploded after delivery to a purchaser, because of defective construction, and while in use by him, there could be no recovery against the manufacturer.

20. The basis of actions for damages, proximate cause.

It is impossible to consider all of the various kinds of negligence that may give rise to an action, but it is desired to illustrate some of the more typical instances upon which actions for damages are based. A person who starts a fire between a barn and a house less than two hundred yards distant, in the vicinity of dry brush, etc., and leaves the fire burning, is liable for the destruction of any buildings or timber by the spread of the fire. Certain acts produce liability no matter how high a degree of skill and care has been used in doing the act. The explosion of a blast in a thickly settled community which causes death, makes the person setting off the blast or causing it to be set off, liable for damages no matter what care and skill he used in exploding it. Now the degree of care required in all normal cases is simply the care generally employed in similar cases. Persons using machines that should be provided with spark arresters, are not required to use the very safest appliances, but only reasonable means to furnish good machinery consistent with the greatest safety and practical use. Leaving turn-tables unguarded or unlocked may at times give rise to an action of negligence. Contractors who fire a blast without giving warning may be held liable. A person has been held guilty of negligence for placing a barrel of fish brine on

a public street where a cow drank it. The negligence for which a defendant can be held liable is only that negligence which is the proximate cause of the injury to the claimant. There is an old legal proverb to the effect "causa proxima non remota spectatur," that is to say that proximate causes and not remote ones are the basis of liability. The meaning of this is that the injury to a claimant must be the natural and probable consequence of the negligence or wrongful act or one which ought to have been foreseen in the light of the attending circumstances. Natural and probable consequences of a wrongful act or omission are not necessarily chargeable to the misfeasance or nonfeasance when there is a sufficient or independent cause operating between the wrong and the injury; but when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. This is as clear and lucid a statement of the fundamental principle of negligence as could be desired.

21. Natural and probable consequences.

A defendant naturally is liable only for the natural and probable consequences of his act. For example, if anyone negligently runs a wagon over a fire hose so that the hose is severed and a building destroyed by fire because the hose could not be used, the cutting of the hose is a natural and probable consequence of being run over by the wagon, and the burning of the building is the natural and probable consequence of the hose being out of condition to extinguish it. The defendant is bound to forsee consequences that anyone would reasonably be expected to foresee. Several persons may act together so as to produce an injury and if the injury is the joint result of the action of two or more persons, they may both be held jointly liable. It is necessary

in this connection to remember this fact, that in many jurisdictions a release of several persons who are jointly liable is a release of all. The reason for this is a principle of law to the effect that there is no contribution among joint tort-feasors or wrong doers. So that it is wise always to know that releases, if any, have been executed to other defendants than the one whom the adjuster represents. If an injury occurs because of the act or omission of some third person intervening between the negligence of the defendant and the injury, the defendant cannot be held liable for the act of the third person. In any event, except in the case of common carriers of property, mere unavoidable accidents for which no one is to blame could give rise to no liability. In the case of common carriers of property such as railroads carrying freight, there is a principle of law to the effect that the common carrier is liable for all losses no matter how occasioned, except those due to an act of God or of the public enemy. This must be carefully borne in mind where a claim presented is for property damaged, against a carrier who has undertaken to transport the property.

22. Determination of the cause of a mishap.

It must be evident that anyone who presumes to pass judgment upon the value of a claim, must be acquainted in some general way with the laws that determine those values, and that law is the law of negligence. A part of this law is learned by lawyers and laymen alike, by sad experience. The greater part of it, however, is accessible through the work of digesters in any number of compilations, digests and treatises, besides which the annual digests contain under the head of negligence, practically all of the decided cases on that subject. We may leave the present discussion with this

thought, that the first duty of anyone attempting to adjust a claim is to analyze the facts until he can safely say "This fact is the exclusive one which produced the accident in which the injuries were sustained." He must say the motorman did not ring his bell; the engineer subjected his boiler to too great a pressure; the driver rushed recklessly out of a side street; the electric wires were improperly insulated; the street was improperly paved; or something of like nature. He then is able to say that one or the other of these acts actually and of itself produced the accident. Having decided this, he must say according to the law of negligence, "did the motorman or the engineer or the driver use such care as any common sense man would have used under those circumstances?" When he has answered this question, he is reasonably sure to be in accord with legal thought upon the subject; in other words, in accord with the cases.

CHAPTER III

FACTS IN AVOIDANCE OF LIABILITY

23. Qualification of liability.

We must not assume, however, that because an accident has happened and is due to the negligence of an employee, that the employer is necessarily liable for the consequences of the accident. The principle qualification of the liability of the person causing the accident is the fact that the claimant has himself helped to produce his injuries. This is known as contributory negligence, and is the defendant's main-stay in an attempt to avoid liability for injury inflicted. The theory is this: If a person is injured and himself and another have contributed some portion of the injury, the law never goes further in order to attempt to apportion the amount contributed by each. If the claimant has helped in any way to injure himself the law gives him no redress against the other party to his injuries. A few illustrations will make clear the manner in which a claimant may forfeit his right to ask anything in damages from the person who has injured him. Suppose that a car fails to stop at a given street, although

the claimant has requested it. The claimant, notwithstanding the fact that the car is in motion, attempts to alight, and is injured. He may be taken in this case to have foreseen and to have taken chances of his being injured by a fall. The fact is that anyone who attempts to get on or off a moving vehicle is unable to collect damages from anyone if he is injured in the attempt. This is a characteristic instance of contributory negligence. Hence a second analysis is necessary after it has been determined that the defendant company or individual has been guilty of negligence. The second analysis is to discover how far the claimant himself may have contributed in producing his injuries. Suppose that it is demonstrated that a car is running at the rate of 40 miles an hour on a crowded street. This of itself establishes the negligence of the railway company, but it is of no value whatever to a claimant who is injured by a jump from a car going at such a rate of speed. The question of contributory negligence may be solved by tests as simple as have been applied in the case of negligence. The question to be asked by the adjuster is, "Has the claimant used that care which the circumstances demanded of him?" If he has not, he has no claim. There are many principles more or less based upon the doctrine of contributory negligence. Among these are workmen's assumption of the risks of their calling. This means in plain English that a workman who goes into a dangerous calling or occupation, assumes himself and forsees according to the law, the dangers to which he may be subjected. A steeple-jack is employed in the most dangerous of callings. If for any ordinary reason aside from defective materials, he is injured, he has no recourse against his employer, and this is true also of injuries to workmen employed about dangerous machinery, such as circular saws and the like.

The literature upon this subject is overwhelming, but the general principles are fairly easy to discover. The value of a claim, therefore, is to be determined in accordance first of all with the principles of the law of negligence and secondly the principles of the law of contributory negligence.

24. Contributory negligence.

The first and most important defense to an action when negligence on the part of the defendant has been proved, is as we have seen, that the claimant himself contributed to his own injuries. The negligence, however, that will defeat the claimant's right to an action must be such that it must have contributed essentially to his injury. The tests of contributory negligence are the same as those for negligence. The claimant's right to recover is not generally defeated unless he or she was at fault. The contributing act, in other words, must be a negligent act. The general principle is that if both parties are guilty of negligence, the plaintiff or claimant has no recovery. The law does not stop to measure the degree of negligence on the part of the plaintiff. As an exception to this, however, the claimant's right is never defeated where he is injured by intentional wrong-doing on the part of the defendant. If the defendant has been guilty of any wanton, reckless or intentional act, the element of contributory negligence is not to be considered. In general, persons who put themselves in positions of known danger are precluded from recovery if they are injured. An example of this is the well-known rule that it is negligence to stand on the platform of an electric car when there is room to step inside. A remarkable instance of this principle is a case where a person for whose death suit was brought, was killed while diving from a trapeze on the beach of the defen-

dant. The trapeze was about 15 ft. high and the water about 3 1/2 ft. deep. It was decided in this case that the deceased was guilty of negligence in voluntarily assuming a position of danger. A woman in ascending the steps of a university was thrown and injured because of her dress catching on pieces of projecting slate. She was not allowed to recover on the ground that the pieces of slate being visible, she should have lifted her skirts in order to avoid striking them. The claimant, however, is entitled to assume that the defendant will perform his duty. The care which a defendant is bound to use is such as the circumstances require of him. If the danger is great, the care required is great, it being assumed that a reasonable and prudent man will be careful in proportion to the danger with which he is confronted. Neither party can be held to the highest possible degree of care, nor can a person who is confronted with a sudden and unforeseen danger be expected to use his wits as promptly and efficiently as he would under ordinary circumstances. It is not contributory negligence for a person doing his duty to perform an act that may imperil his life or personal safety. The particular acts that generally fall under a classification such as this are dangers that persons incur for the purpose of saving life or property. Thus it is not contributory negligence to enter a burning building for the purpose of saving the life of a fellow being. Nor is it contributory negligence to walk upon a railroad trestle for the purpose of helping another to avoid danger. The saving of property comes under the same rule to a certain extent. In general, one who measures his own life against valuable property will not be permitted to recover. A person who is a trespasser, however, is permitted to recover only where the negligence is wanton, willful or intentional.

25. Persons under disability.

In the case of persons under legal disability such as children or intoxicated persons, the degree of care required is proportionate to the duty to exercise it. But the persons excluded from contributory negligence are generally persons confronted by sudden dangers, lunatics, drunkards, and children of tender years.

26. Imputation of negligence.

The most that can be accomplished in a work such as this, is the indication of broad general lines of liability and the suggestion of tests that may be applied in all cases. Let us consider for a moment a few particular cases of negligence that are of frequent occurrence, and of which a certain knowledge is essential. One of these is the doctrine of imputation of negligence. The meaning of this phrase is simply that where one individual, Smith for instance, has been guilty of negligence or of contributory negligence, that has resulted in injury to Brown who was with him, riding in a wagon, for example, the negligence or contributory negligence of Smith cannot be made the negligence of Brown if Brown is hurt by someone else and seeks to recover. "The negligence of the driver of a private conveyance cannot be imputed to a person riding in the vehicle who was not the employer of the driver." This may be illustrated by reciting the facts of the accident from which the paragraph just quoted has been taken. A telephone company planted its poles so near to the traveled portions of a road, that Little, who was seated on the side of a hay wagon with his feet extended about a foot from the wagon, was injured by contact with the poles of the telegraph company. The result of the case was that the Central District and Printing Telegraph was obliged to pay damages to Little for the injuries sus-

tained. There was a question in the case whether or not the driver of the hay wagon was himself guilty of any negligence, and there is some possibility that the driver was not as careful as he might have been. But the fact that the driver was negligent, did not of itself constitute negligence on the part of the person who was with him in the wagon and who was hurt. The only question in such a case is whether or not the person hurt was individually guilty of some act of negligence. For example, whether his conduct was reckless, or to use the legal principle, whether he was exercising that care which any ordinary man of common sense would use under the circumstances. Had the passenger been the employer of the driver, the case would have been different, as he was responsible for the acts of his servant. One principle involved in the case under discussion was that a jury must determine whether or not a person riding in a wagon on a public highway is guilty of negligence in permitting his feet or arms to extend beyond the side of the vehicle. This is a case that occurs with some frequency, and the principle involved should at least be known to the claim agent.

27. Injuries due to acts of third persons.

Again, injuries to the claimant may not be the result of the defendant's acts at all, but they may result from the act of some stranger. Suppose for example, that the line-man of a telephone company is ascending a ladder, to reach the top of a pole, and that when he is half way up the ladder, some jocular individual pulls the ladder from under him. It is clear that if he is injured by the fall, the telephone company is not responsible for his injuries. The third person has intervened and caused damage to him and therefore, whatever claim he has must be presented to the person who

pulled the ladder from under him. Suppose that a passenger is about to alight from a car and that before he has alighted, another passenger quickly gives the signal to the motorman to start the car, whereby the passenger who is alighting is severely injured. It would be an extreme case that would make the car company liable under such circumstances, and such facts form an important part of the investigator's statement. It is true that conductors sometimes delegate the duty of giving the signal to the motorman to passengers on the rear platform, and such practices are likely to lead to liability on the part of the railway company. But normally where a person causing an accident is not an employee of the one against whom the claim is presented, he is the sole one responsible for the injuries to the claimant.

28. Children of tender years.

Some mention has been made of cases of negligence in children of tender years. Such matters arise generally where children at play creep through openings in fences, or run on railroad turn-tables, or pick up charged wires, and matters of the like. It is almost impossible to give a test for cases presenting such a variety of facts. If a child is of very tender years, aged three, four, or five, the parents are usually held guilty of contributory negligence in permitting so young a child to run unguarded through the streets. So that cases of this nature, where for example, a child three years old has suddenly darted before a moving electric car, generally mean that the claim cannot be made the basis of a suit. An interesting example of this was a case in which a power company had a picket fence about its plant, and was in the habit of dumping hot ashes as they were removed from the furnace upon

the ground enclosed. A child less than four years old crawled through a small opening in the picket fence and sat in the hot ashes. The result was that the poor little tot was severely burned, and a consequent lawsuit, in which the propositions were settled that the power company had been guilty of no negligence since it had enclosed its grounds and had dumped its ashes within the enclosure, and also that the parents of so young a child were guilty of negligence to permit it to run where such dangers might be incurred.

29. Injuries to employees. Liability or non-liability.

There are some special features of the law to be applied when the claimant is an employee. It has long been recognized as a legal principle that when one employee is injured by the act of a fellow workman, he has no claim for damages against his employer. The situations that arise under such doctrines are extremely complicated and only the most general tests can be given here. Let us consider a few typical cases. Suppose that a workman is employed at a weaving or spinning machine and that there is a device attached to the machine called a blower for getting rid of the waste. Suppose that the blower clogs up and the workman without stopping his machine undertakes to place his hand in the blower and clear out the waste. Except in very rare instances, the employee cannot hold his employer liable for the injuries received. But this accident may take place in other ways. If the blower in which he is injured is one of an antiquated type so that the machinery is far below the ordinary modern standard of efficiency, there is some possibility that the employer may be liable. This is particularly true if the weaver or spinner has been instructed by his master or by a superintendent to clear the blower in

that particular way. This brings us to another realm of debated and important questions. A person who represents the employer and gives orders for him to the employees is generally termed in legal parlance a vice-principal. The vice-principal stands in the place of the employer and any injuries caused by obeying orders given by him may be charged against the employer. There are so many phases of this doctrine, however, that accurate knowledge of the principles of the law of master and servant are almost indispensable to successful work on the part of an adjuster if any number of master and servant claims falls to his lot.

30. Employer's liability.

The socialistic tendency of modern legislation is responsible for the passage of many statutes that have increased the burden on the employer. Some statutes make the employer liable for injuries received in the course of the employment, although they were produced by a fellow servant. This legislation has been attacked and is now before the courts for a test of its constitutionality. It will be seen that the analysis of a case presenting injuries to an employee is somewhat more complicated than the ordinary case of negligence. The general order of investigation should be. 1. Did the claimant sustain any injuries? 2. Was the accident that caused the injury due to negligence for which the employer may be charged?

a. This is modified by inquiring if a fellow servant produced the injuries.

b. It is further modified by ascertaining if the injury may be due to the claimant's assumption of the risk of a dangerous calling.

c. The principles of contributory negligence must be applied.

31. The basis of a claim for personal injury.

The basis of every claim is loss to the claimant. If the accident has occasioned the claimant no loss or inconvenience, however grevious the negligence of the defendant, he is entitled to no compensation. Suppose that a collision occurred and a claimant asks compensation for a hernia. If it can be proved that he had the hernia before the accident and that it has been in no wise aggravated by the accident, he has suffered no pain or loss. His claim has no value. This inquiry is one of the most important and the most fruitful that the adjuster can pursue. Although an accident has happened and the defendant has been negligent, he cannot be called upon to pay for injuries that were in existence before the accident happened. We may leave this subject then, although we have treated it but briefly, with the statement of this general principle. The condition of the claimant to form the basis of a claim must have been changed by the accident or occurrence due to negligence. If it has been changed for the worse, he is entitled to compensation. The fundamental test invariably applied is: What sum of money will place the claimant in as good position as he would have been in had no accident occurred? If he has lost a limb or member of his body, literally placing him in the same position is impossible. It becomes a question then of trying to estimate in cash the value of a broken or lost member and the consequent pain and suffering.

32. Former condition of claimant as a key to present condition.

But if the case presents a possibility that the former condition of the claimant would explain his present condition, even if no accident had occurred, there is a strong probability that the injuries are not due to the negligence of the defendant, and the amount payable

in damages falls to a minimum determined by the circumstances—the cost of litigation—the possibility of the claimant's success, and the like. The actual measurement of these factors will be discussed under a subsequent topic dealing with specific conditions and diseases.

CHAPTER IV

NATURE AND EXTENT OF INJURIES SUSTAINED

33. Physical examination of claimant.

We have already dwelt upon the fact that it is not enough to know that the claimant was hurt, and that his hurt was caused by the defendant's negligence. They are merely the preliminary inquiries. The first step in fixing a sum of money as the value of the claimant's loss or injuries, is to determine how much he has been injured. Where the injuries are to some part of his body, we prove these facts by means of a physical examination. This examination is the work of the physician, and the investigator must depend upon the physician for a full and complete statement of what is disclosed by an examination of the claimant's person. This examination is not always so fruitful as might be supposed, particularly if the injuries for which the claimant has asked damages are of a subtle nature. It is not always a simple matter for the most expert of physicians to say that the claimant has or has not a genuine case of paralysis of the throat that has rendered

him unable to talk. This sort of injury has at times been counterfeited with entire success. It must be understood that this is impossible in the case of a broken leg or a broken arm, painful bruises, dislocations and other matters of the like. What must be established beyond all peradventure by the physician's physical examination is that the claimant was or was not injured in the accident. It is necessary to know that a change in his condition has taken place as the immediate consequence of the accident. If he has two broken ribs that have progressed at least six weeks toward recovery and the accident occurred two days before, it is obvious that the broken ribs are not the result of the accident. In any event, the first great and important step in fixing values, is the physical examination. Upon the results of that examination depends much of the subsequent handling of the case.

34. Its part in determining the value of the claim.

The physical examination bears the same relation to determining the value of the claim as the examination of the facts of the accident. The facts of the accident fix the legal status of the defendant or in simpler language they enable us to decide that a claim has arisen or that the claimant has a valid right to compensation. The physical examination furnishes us with the second important series of facts that help to determine the value of the claim. The first and most interesting inquiry that must be undertaken as a result of the physical examination, is whether the injuries are permanent or whether they will be cured in a short or long interval. If the claim is based upon injuries that are undoubtedly permanent, the claim at once presents itself to us as being in the highest degree serious. No one can say what compensation is adequate for the loss

of an eye, the loss of an arm, the loss of a leg, or infection with a chronic disease. There is a further element to be considered in connection with the permanence of the injuries, and that is what degree of constant pain will accompany the continuance of the condition. If a man has been deprived of a leg, the pain after the cure has been effected, is largely mental. If his living depends upon the rapidity with which he can move about, then a lameness due to the loss of a leg which prevents him from moving about in that way, becomes a large factor in estimating the value of the claimant's demands. On the other hand, if the injuries are not of a permanent character; if they are represented by bruises which will disappear in a more or less short time; if they consist of cuts or scratches; temporary loss of speech; a broken bone; dislocation or a fracture; a reasonable approximation of the value of the claim based on such injuries may be reached.

Suppose that an arm has been fractured. The claimant is a type setter and earns $20.00 per week; he is obliged to cease work and remain home for ten weeks. His loss of earnings during that time is $200.00; the expenses of medical attendance are $75.00; he must expend for medicine and other miscellaneous necessaries a possible $50.00 more; he may have expended $30.00 for nursing; this gives a total actual cost to the claimant of $355.00, assuming that at the end of ten weeks he can resume his occupation and that he has incurred no other losses. To this a certain sum might be added to compensate him for the pain and suffering which we may place at $100.00. For the temporary injury, therefore, to a broken arm, in the light the circumstances described, we would in this manner arrive at a figure of $455.00. We have placed arbitrary figures upon the various items for the simple reason that we

are not taking an actual case. The considerations that affect the value of a claim in an actual case might result in increasing or in decreasing the figures that have been given above.

35. Permanent injuries.

If the injury is permanent the problem is of another sort. The physical examination will show to a certain extent what is the probability of a total or partial disability. We can say at once that the removal of an arm or leg is a total and permanent disability. We can say of a broken arm that it is a partial and temporary disability in almost all cases. Our investigation, however, does not end at this point. The value of the claimant's right to compensation depends also on the possibility of his injuries taking a serious turn in the future. If his injuries have resulted in incipient paralysis, we are bound to consider the possibility of this paralysis increasing and extending to the claimant's whole system. If one of his eyes has been badly affected, there is a possibility that by sympathy, the other one will become diseased. These are broad but typical instances and medical science will furnish us with hundreds of other illustrations of like nature.

36. Previous injuries.

But the injury disclosed by the examination of the claimant's person may not be an entirely new injury. He may have had nervous trouble prior to the accident which has been accentuated by the accident. He may have been well on the road to recovery from typhoid fever, and the accident may have produced a relapse. He may have had a hernia prior to the accident and a double hernia subsequent to it. The physical examination will determine with more or less certainty to what

extent the claimant's present condition is an aggravation of his previous condition.

37. The claimant's statement.

In general, the first news of the claimant's condition comes from the claimant himself. That statement furnished by the claimant is of paramount importance in determining the value of his claim. It is a living human document that is bristling with information. It tells much more than is contained in the mere words written by the claimant or that have fallen from his lips. It sometimes bears upon its face unmistakable evidence of the integrity of the claimant. It may just as well reveal at once his duplicity; it may show so great an exaggeration of his injuries as to put the adjuster at once on his guard against possible extortion. Many instances occur in actual cases that illustrate the matter perfectly. A passenger in a car recently suffered a slight shock because of the breaking of a pane of glass in a very slight collision. Some months after the collision, however, a claim was presented based upon an advanced condition of tuberculosis which the claimant alleged was due to the collision and the breaking of the pane of glass. It is true that this case resulted in a rebuke from the court to the claimant, but all such cases are not always so broad nor so grossly unfair. In fact, they shade off to cases where it is well nigh impossible to say to what extent the claimant has exaggerated and to what extent he has manufactured complaints.

38. Application of principles.

We have now considered in the most general way the circumstances or factors that affect the value of the claim. We are speaking now simply of the injuries

sustained. We are not dealing with the q estion of whether or not the defendant has been guilty of negligence in such a way as to make him liable under the law. That question has already been dealt with. It may be assumed for the present purpose that liability has been fixed upon the defendant and that he must pay at all events. Our whole question now is, how much he shall be paid. It has been seen that the first element of damage that we must consider is the nature and extent of the injuries. We have dealt with only general principles in this chapter. Let us now take some concrete cases and apply the principles that we have examined.

Case I.

39. Examples.

William Hawkins has been injured by the collapse of a scaffold. The circumstances are such that his employer must compensate him for any one of a dozen reasons. The reason that we shall give in this case is that the foreman of the Acme Paint Company, for whom Hawkins was working, sent him with a dozen men to the top of the scaffold, which was insufficient to bear their weight. The foreman was warned of the danger and took a chance that the strength of the scaffold would prove sufficient. The scaffold collapsed and Hawkins with some others fell to the ground from a height of 40 ft. striking upon a cement pavement. Hawkins' employers admit their liability. The sole question to be determined is the nature and extent of Hawkins' injuries. In the fall, Hawkins breaks several bones in his foot. The nature of the break is such that only the most careful medical attention can save the foot for him, and give the slightest encouragement that it will be useful in the future.

40. Analysis of Case I.

Let us say at once in a case of this sort that the more quickly and graciously Hawkins' employer agrees with him upon the value that may be set upon his injuries, the better it will be for all parties. The following facts must be considered: Hawkins by trade is a painter. Not a little of his worth to his employer depends upon his agility in moving about in more or less exposed positions. He is expected to work on lofty scaffolds, and to transfer himself from place to place while 40, 50, or even 100 ft. from the ground. Any uncertainty in his movements, therefore, deprives him of a large part of his value as a painter. He presents to his attorney a claim for damages, showing that his foot has been broken in three places; that his nervous condition is extremely serious; that his courage in ascending scaffolds or other dangerous places has been permanently reduced; that the doctors offer a reasonable certainty that his leg will be of some service in three months time, and that in a year's time, it might be considered cured. The physical examination coincides almost exactly with the statement given by Hawkins. We have here eliminated entirely any question of the claimant's statement being exaggerated or fraudulent. There are several elements here that deserve consideration. The first is that the injuries are to a certain extent permanent. It is entirely improbable that his earning power in his line of work will ever be as great as it has been. The case, therefore, presents a certain element of permanent injuries and another element of temporary injuries. Assuming that Hawkins is forty years old, his earning power may have been diminished at least $3.00 per week for the remainder of his life; a large item to consider assuming an expectancy of at least twenty years. If his salary is $20.00 per week,

his loss for the year during which he cannot resume employment will be at least $1000.00, while his expenses for medical attendance, etc., will be proportionate. These factors are modified by many other considerations, but admitting the liability of the employer in cases of this character, it would seem inexpedient to delay unnecessarily their prompt adjustment.

Case II

41. Examples.

Assuming again the liability of the defendant. The claimant, Henry Smith, while a passenger in an elevator controlled by the Anglo-American Title Company, is injured by a fall of the elevator from a height of 10 stories. It is known that after the accident, Smith was able to walk to his office, and was not confined to his bed for a period of more than a few days at the most. His claim for damages, written by himself, alleges permanent disability; the aggravation of a hernia, or serious internal injuries; great nervous disorders; a shock that is partially depriving him of his eyesight; a bronchial trouble which he alleges has developed since the accident; a lameness which he claims impedes his movements; and many other injuries which we need not detail. In view of the fact that Smith has hardly lost any time from his business, and of the fact that his injuries as detailed by himself seem sufficient to have killed any ordinary mortal, the investigator is at once put upon his guard.

42. Exaggerated statements.

Smith, the claimant, has at least enumerated all the possible injuries short of the loss of his life, that could have resulted from such an accident. The results of the

physical examination in this case must be scanned with the utmost care. If Smith should refuse, as claimants have a right to do, to permit an examination of his person, the need of care is redoubled. Where an action is pending in court, there are proceedings available to compel the claimant to submit to a physical examination by physicians representing the defendant, but in some states, this examination is only compulsory within three or four months of the time of the trial, so that the investigator or adjuster necessarily must investigate every fact accessible to him in the most careful manner. If Case I betrayed facts that would inform any experienced adjuster immediately that the case should be settled promptly, Case II suggests that possible settlement should be deferred until after a most thorough investigation. There is apparently no loss of earning power to consider and the actual injuries to Smith, if he refuses to submit to an examination, are to some extent likely to prove unfounded.

43. Summary.

We may leave this chapter, therefore, with this observation, that having disposed of the question of liability, the valuation of a claim depends largely upon the nature and extent of the injuries sustained. If the facts concerning the occurrence are to be thoroughly investigated, those concerning the condition of the claimant are to be most thoroughly investigated. For this is the point at which possible fraud or exaggeration is most likely to be undertaken.

CHAPTER V

THE FACTS OF THE OCCURRENCE

44. Investigation of facts.

Before one can expect to arrive at a reasonably accurate approximation of the value of a claim for damages, he necessarily must first possess himself of a fairly clear understanding of the probable facts of the particular occurrence upon which is based the demand for compensation. If this information be difficult of attainment, or should serious inconsistencies develop with respect to essential details, or the exact relationship between important facts appear obscure or even impossible of reconcilement, the difficulties of the adjuster in harmonizing the evidence in any given case are correspondingly increased.

While it is true, of course, that the investigation of a

case ordinarily is completed, or at least should have been completed before reaching the hands of the adjuster, still it may not prove amiss at this time for us to review briefly certain features of the work which appear to have a more or less direct bearing upon a subject of such obvious importance as the proper investigation of accidents. "Non-liability" accidents, when insufficiently investigated, all too frequently assume "liability" proportions when viewed from the standpoint of the adjuster.

45. Principles of investigation.

We do not know of any particular mode of investigation, which, as a whole, may be said to be superior to all others. Different concerns follow different methods in this respect, each seeming to have devised and perfected a course of procedure which in the light of experience seems best adapted to meet the particular requirements of the locality for which it was especially designed. There are, however, certain well-defined, broad-gauge principles which may be found with uniform regularity in practically all well conducted claim departments in their investigations of accidents and claims for damages. Not all of these, of course, are applicable to every individual case, for particular cases oftentimes require special investigations along exceptional lines. These principles cover a relatively wide range of territory, and since it is essential that the adjuster should be able instantly to detect the absence of data of vital importance to his case, we may properly digress for the moment while we examine in some detail certain features of this phase of the work. These we shall consider in the order in which they ordinarily would receive attention at the hands of an experienced investigator.

The first step in the investigation of an accident very properly consists of a careful examination of such reports, statements, or other preliminary data as may have been submitted to the department by company representatives who were present at the time of the occurrence, and who, therefore, possess first-hand knowledge of the details. From the information thus acquired a general impression may be formed as to the probable facts in the case, and temporary instructions issued for the immediate guidance of the investigators. Due allowances necessarily will be made for inaccuracies which not infrequently play a prominent part in these early reports. Excitement, exaggeration, confusion, and attempts to "cover up" often prevent their being accepted at "face value" until corroborative evidence has been secured.

46. Interviewing company employees.

The next step, then, centers about the task of personally interviewing company employees, in order that detailed statements may be obtained, setting forth with clearness and exactness the precise facts of the mishap. At this time numerous details will be disclosed which were not incorporated in the original reports. These interviews will be reduced to writing and the signature of each employee attached, properly witnessed. The added precaution may further be taken of having these statements attested by a notary.

Then follows an examination of the police blotter for the names of additional witnesses, the name and address of the injured party, provided the same was not correctly secured at the time; the name of the hospital, and such additional information as it may contain. An examination of the records of the hospital may still further facilitate the work of investigation.

Some few companies refrain from communicating in any way with the injured party. Unless this practice is being pursued, efforts may now be made to secure an interview with the person directly concerned, or if this be impracticable or inadvisable, then with some member of his or her family, or even with a close personal friend. Seldom will anything be gained by unseemly haste in this connection. The personal wishes of the claimant or of his family should be fully respected. Forced interviews not infrequently prejudice a case and at times produce results somewhat unfortunate.

47. Interviewing the claimant.

The investigator having made known his mission and the courtesy of an interview having been accorded him, he now is in a position to extend to the injured party the sympathy and regrets of his employers, and to assure him of a prompt and impartial investigation of the entire affair. He also will extend to him the opportunity of describing in detail his own version of the mishap, this oftentimes being reduced to writing, and to which he may affix his signature should he feel so inclined. The greatest care should be exercised to quote accurately and correctly all facts described by the claimant, using in so far as may be practicable the exact phraseology employed in the recital. Before he shall be permitted to sign the statement, it is imperative that he should have proof-read the instrument in its entirety, and that the recital of the facts therein set forth shall meet with his approval. Should changes, corrections, or insertions of any moment become necessary, a new draft should immediately be prepared.

Not only should this interview have to do with the essentials of the mishap itself, but as well with various

correlative facts which may prove of assistance subsequently in arriving at a satisfactory disposition of the difficulty. The probable value of an honest, legitimate claim for damages will in no wise be lessened or affected by a reasonably thorough investigation of all of the facts upon which it rests.

48. Interviewing witnesses.

The work of interviewing witnesses obviously is one which requires at times the exercise not only of tact and diplomacy, but of patience, perseverance and ingenuity as well. Prejudice, ignorance, and undue suspicion not infrequently combine to render difficult the task of the investigator. Greater responsibility attaches to this position than would at first seem apparent to the uninitiated, for the entire subsequent history of a case may depend upon or be markedly influenced by the work of the investigator. In large measure both the claimant and the defendant company are dependent upon his good offices for the faithful and conscientious discharge of his duties.

49. Witnesses classified.

Witnesses as a whole are subject to various classifications, among which may be noted the following customary designations:

Defendant's witnesses. Those obtained by company representatives at the time of the mishap, and usually incorporated as an integral part of the original reports of the occurrence.

Plaintiff's witnesses. Those furnished or obtained by the injured party or by his friends or representatives.

Interested witnesses. Those considered as having a personal interest of one character or another in the out-

come of the controversy. Employees of the company, relatives of the injured party, personal friends of the claimant, former claimants against the defendant, or persons known to be hostilely inclined toward either of the principals, are usually included in this classification.

Disinterested witnesses. Those having no especial interest in either party to the controversy. Popularly regarded as being without bias or prejudice.

Police witnesses. Such as may have been secured through the agency of policemen or other guardians of the peace. Usually made a part of the records of the police department and therefore accessible alike to plaintiff or defendant.

Vicinity witnesses. Those whose names were not secured at the time of the occurrence, but whose connection with the incident is disclosed through the medium of a house-to-house canvass of the immediate neighborhood of the scene of the mishap.

Advertised witnesses. Used in a double sense. Either, the appearance in the public prints of the names and addresses of witnesses in the published accounts of the mishap, or else the uncovering of possible witnesses through the insertion of advertisements in the daily newspapers.

This list, however, would be incomplete without reference to still another distinct class of witnesses to whom no special designation seems to have been given, but whom we may term "consideration witnesses," in that they demand a consideration or emolument of some character in return for their testimony. Their grasping proclivities lead sometimes to a demand for money, or for employment, or for the granting possibly of some special favor or concession. Plaintiffs, as well as defendants, presumably encounter this type of witness in their search for evidence. While it does not

necessarily follow that a witness of this school would deliberately commit perjury in the subsequent hearing of a case, still the presumption of truthfulness is not sufficiently strong in his behalf to warrant one's reposing even a scintilla of confidence in his testimony. The demands of "consideration witnesses" very properly merit the contemptuous silence with which they invariably are received, alike by plaintiff and by defendant.

50. Forms of evidence.

The exact form in which evidence is obtainable depends oftentimes upon the circumstances surrounding each individual occurrence. Some witnesses can be induced to give only a brief outline of their knowledge of the matter in hand. Others, though less reticent, nevertheless refuse to permit the interviewer even to make notes of their conversation, while still others will give a written interview but will decline to certify to its accuracy by affixing their signature. The great majority of witnesses, however, evince but little hesitancy in furnishing the fullest details over their signatures, providing only that the investigator has quoted them fairly and accurately.

Upon large systems a very considerable number of witnesses in cases of minor importance, or even in some instances of established liability, are satisfactorily interviewed through the mails. Printed blanks are used which call only for the more important details, and a stamped addressed envelope is enclosed for the reply.

51. Attending physician.

A preliminary statement by the attending physician often is of much assistance during the early stages of an investigation. The particular nature and character of

certain injuries occasionally bear a peculiar relationship to the facts of the occurrence, supporting or controverting, as the case may be, essential features in its development. In considering this aspect of the situation, however, the degree of importance to be attached to such a statement will, of course, be governed somewhat by the character and standing of the physician concerned. Due allowances must necessarily be made for bias, prejudice, open hostility, known incompetency, or a recognized tendency toward exaggeration.

52. The physical examination.

At the proper time a request will be made, usually in writing, that it may become a matter of record, for the privilege of a physical examination by the defendant's physician or surgeon, with a view to determining the precise nature and extent of the injuries alleged to have been sustained at the time of the mishap. The nature or severity of the injury alleged, the character and general reputation of the physician in attendance, and likewise of the attorney if one has been retained, as well as certain other special conditions or qualifications, are all matters deserving of thoughtful consideration in selecting surgeons for assignment to cases of recognized importance. This examination invariably is made in the presence and with the assistance of the attending physician. Its general scope and character necessarily depend in large measure upon the particular circumstances surrounding each individual case.

53. Special features.

The physical or mental condition of the claimant at the time of, or immediately preceding the moment of the occurrence not infrequently furnishes a satisfactory explanation of conduct which otherwise would seem inexplicable. Mental derangement, either permanent

or temporary, over-indulgence in intoxicants, defective hearing, impaired eyesight, organic weaknesses, attacks of vertigo or other forms of sudden illness, all contribute daily their share to the general accident toll. The practice so frequently followed of attempting to conceal the existence of such details oftentimes renders most difficult the task of arriving at a reasonably satisfactory determination of the proximate cause of an accident.

Prevailing modes or particular styles of wearing apparel have of late years played a somewhat conspicuous part in contributing to the total number of mishaps wherein women sustain injuries. Especially has this proven true with respect to steam railroad operation. Unfamiliarity with local conditions, disregard of established traffic regulations, failure to observe restrictions or obligations imposed by special ordinances or statutes, latent defects, mechanical failure, and countless other contributing causes, direct or indirect, all constitute additional problems which may prove of the most vital importance to the ultimate issue of a case.

54. The scene of the accident. Detailed reports.

With a view to testing the accuracy of some special portion of the evidence, or of determining the practicability of a particular theory or explanation, or of supporting or combatting essential features of a case, the scene of a mishap frequently is subjected to the most painstaking scrutiny. Photographs of the locality are taken from different positions and at various angles in order that indisputable evidence may be obtained as to certain existing conditions at the time of the occurrence. Company employees and other eye-witnesses may even be asked to re-enact the principal features of the affair upon the scene, in an effort to establish beyond peradventure the precise facts of the mishap.

Steps may then be taken to procure an exact map or plan of the vicinity of the scene of the accident, showing in detail all streets, roads or other highways, both main and intersecting, sidewalks, gutters, grades, distances, location of tracks, street lights, curves, switches, turnouts, cuts, bridges, culverts, poles, platforms, trees, houses, obstructions, warning signs, guards, lights or signals.

In order that they may be made matter of record, special detailed reports oftentimes are secured from superintendents, foremen, inspectors, or their assistants, setting forth with clearness and exactness, the results of their observation or examination of rolling stock, roadbed, overhead construction or other equipment, with a view to determining whether the same had been properly maintained and kept in satisfactory working order.

55. Unreported accidents.

Thus far we have assumed that the customary accident report has been available as a basis for investigation in such cases as have given rise to the presentation of claims for damages. We must now consider a somewhat different classification of the subject: one which presents to the investigator or adjuster problems of a most perplexing character, and which, if unskillfully handled, may prove of serious moment to his employers. We refer to what are commonly termed "blind or unreported" accidents.

It is customary to require of employees a prompt detailed report of every mishap, irrespective entirely of any question of apparent severity or importance, as it may appear to them at the time of the occurrence. Yet, at times, for reasons best known to themselves, employees occasionally choose to disregard these in-

structions. Having once taken this stand, they naturally are extremely reluctant subsequently to admit any knowledge of the occurrence, and thus render still more difficult the task of the investigator to arrive at a satisfactory determination of the probable facts of the incident. This, in turn, leads to still further complications, in that the investigator or adjuster may as a result entertain serious doubts whether such an accident really occurred in point of fact: in other words, whether the claim may not have been conceived in fraud and deception.

The skill of both investigator and adjuster is taxed to the uttermost limits in handling cases of this description. Such meager facts as may be obtainable have to be weighed in the light of reason and experience with the utmost exactness. Resourcefulness, determination, and the ability accurately to read human nature often uncover the basic facts of such a case, once a searching investigation has failed to clarify the situation.

56. Previous accidents or claims.

It is not an extraordinary occurrence for a claimant's name to appear more than once upon the records of the same company. Before a case, therefore, is passed upon finally for adjustment, it is incumbent upon either the investigator or the adjuster to examine the records of his department and to ascertain whether prior claims may not have been presented by the same party. In the event of such proving to be the case, a digest of the facts, at least, should immediately be incorporated in the evidence for the future guidance and protection of the adjuster. This in a measure guards against the possibility of one's being obliged to pay a second or even a third time for identically the same injury. In like

manner, circumstances permitting, cases of any moment should first be reported to both the local and the national index bureaus, as a precaution against the inroads of "floaters and repeaters."

Certain types of claimants instinctively arouse doubt in the mind of the investigator as to their good faith. It may therefore be deemed advisable that their past record be scrutinized, their reputation inquired into, and their general standing in the community determined. Their occupation may be somewhat obscure, or their earning capacity enshrouded in mystery, or their alleged losses plainly exaggerated or inflated. It oftentimes is difficult, if not actually impossible, to secure such information in the manner in which investigations ordinarily are conducted, and detectives or secret service inspectors are therefore occasionally assigned to cases of this character.

57. Attitude of management.

In a measure, it is sometimes possible to judge of the general attitude of a concern toward its patrons and employees by noting the policy of its management as reflected through its claim department, with respect to such details as will hereinafter be touched upon. It is not to be expected, of course, that liberality in the adjusting of claims will be carried to the extreme in order that all the demands of claimants shall be satisfied, dollar for dollar, irrespective of the relative merits of their cases. The true test is merely one of fairness and of justice. Nothing more can be asked, nothing more should be expected.

58. Impartial investigations.

A temporary advantage, if gained unfairly, is no advantage at all, and not infrequently will prove even-

tually to be a distinct disadvantage. This holds true of claim work, as of all other walks of life, and constitutes an axiom that is not to be lightly regarded, if success is to attend our efforts.

It may at first seem captious for us to dwell upon a point so vitally essential to successful claim work as the obvious necessity for sincerity in the customary investigation of accidents, for without this quality the task of examining evidence and of determining responsibility would be a most hazardous undertaking. In explanation of this, however, it may be observed that while the average head of a department genuinely intends that truthfulness and accuracy shall characterize all of his investigations, he may himself unconsciously be taking it for granted that all of his assistants have an equally acute appreciation of this highly important phase of the work.

By this we do not mean to infer that responsible investigators would deliberately manufacture evidence, or that they would intentionally mislead their superiors as to the real facts of a case. With men of this caliber we have no concern. We intend rather to direct attention to the danger thoughtlessly incurred occasionally by the investigator who unintentionally inclines somewhat toward the practice of influencing statements by giving undue prominence to unessentials, or by lending strength to wavering witnesses who afterward "fall down" when placed upon the stand, or by submitting optimistic reports of one character or another which are not fully justified by the facts.

While not actuated by improper motives, such work nevertheless militates against impartial investigations and invariably is unfair not only to the claimant or witnesses involved, but to the defendant company as well, inasmuch as its adjusters or other representatives

may subsequently be given an incorrect or erroneous impression of the strength or character of a case.

To the adjuster, then, should be given the safeguards guaranteed by fair and impartial investigations upon such matters as may be assigned to him for final disposition.

59. Prompt investigations.

Few indeed are the concerns which knowingly permit their investigations to be delayed unnecessarily, for the fact nowadays is too generally recognized that while little is to be gained, much may be lost by dilatory methods in this direction.

If a case is to be marked for settlement, it is due the adjuster that the facts should be accurately ascertained at the earliest possible moment. Deferred investigations not infrequently encounter almost insurmountable obstacles. As a general proposition in claim work evidence is more readily obtainable within a reasonably short space of time following the occurrence than is the case after several weeks or even months have elapsed. Time heals all wounds and embellishes all facts. A claimant in perspective looking backward to the time of the accident frequently loses sight of all facts damaging to himself and sees those favorable to his own interests as though through a magnifying glass.

Prompt investigations do not necessarily imply superficial investigations, nor yet snap judgment upon the part of the adjuster with respect to the advisability of opening up negotiations for disposing of the claim. As time advances, the demands of claimants invariably grow apace; witnesses not infrequently remove from the jurisdiction, and some even drop entirely from sight; others in time are subjected to mischievous influences, while subsequent mishaps or occurrences of

one character or another occasionally serve to change the viewpoint of an important witness. In any event, facts usually stand forth with greater clearness and distinctness in one's mind immediately after an occurrence of this sort than is ordinarily the case at a later date.

60. Thorough investigations.

While it is true, of course, that certain types of accidents require but little investigation aside from a proper determination of the extent of the injuries involved, and of the probable losses sustained, it also is true that other types require the most painstaking investigation in order that the full facts may be disclosed. And the latter, when considered in the aggregate, usually constitute the major portion of the business of the average department.

There is always a certain sense of satisfaction, more especially in cases involving costly adjustments, in knowing that all of the facts were fully disclosed before the matter reached final disposition. Few adjusters can do themselves or their employers justice when discussing terms upon a case the investigation of which they realize to have been incomplete and unsatisfactory. Though the accomplishment of this may in some instances prove most difficult or even impossible, it nevertheless is but reasonable to ask that an honest effort, at least, shall have been made to ascertain accurately all of the essential facts of a case.

The additional expense entailed by the thorough investigation of claims is, in almost every instance, insignificant when compared with the benefits gained therefrom. Not only is the legitimacy of the honest claim firmly established and its probable value approximated to the satisfaction of those immediately con-

cerned, but an ever alert watch is maintained against the successful prosecution of illegitimate claims for damages. Especially applicable is this alike to the casual malingerer and to the so-called professional litigant. Instances without number may be cited wherein the fraudulent intent of fictitious claims and suits involving large sums of money has been disclosed largely because of the thorough methods pursued by the companies concerned in their investigations.

Good business principles would seem to demand that adjusters be given the additional assistance and protection afforded by reasonably complete and thorough investigations.

61. Clean investigations.

In the transaction of business of this character upon an extensive scale, more especially in the larger cities, it is inevitable that the representatives of a department should perforce be thrown into contact from time to time with a certain stripe of claimants whose every act seems to be influenced by base and sordid motives.

Occasionally in the past, in isolated cases fortunately, investigators and adjusters appear to have formed the mistaken idea that in order successfully to uncover the true character of such cases, it has become necessary that they should lower themselves to their level. In not a few instances the ability of the investigator or adjuster subsequently to distinguish between right and wrong in the conduct of his employer's affairs became seriously impaired and his services consequently less desirable.

Such work has a dank and unwholesome atmosphere. It has none of the strength and vigor of clean, healthy claim work. No official possessed of a proper appre-

ciation of the true character of this branch of railroading will submit himself, nor suffer those under his supervision to submit themselves to its contaminating influences. Nor should any representative of his own initiative be permitted to resort to tactics which eventually may reflect upon the good name of a concern.

Methods which are fair alike to claimant and to company furnish to a community the best proof of good intentions. Let the investigation be ever so energetic, thorough, resourceful and persistent, but above all else let it be fair, clean and impartial.

CHAPTER VI

FACTS IN MITIGATION OR ENHANCEMENT OF DAMAGES

62. What diminishes the value of a claim?

The facts considered heretofore, have fallen into two broad general classes. They are the facts bearing upon the happening of the accident, and secondly, the facts bearing upon the claimant's injury. We must now consider those subordinate matters that affect the value of the claim, either in diminishing its value, or in increasing its value. Let us consider first, those factors that mitigate damages or those that diminish damages. The existence of diseases may have two effects upon the value of a claim. They may form the very basis of the claim, for the previous injury or disease may have been aggravated by an accident. On the other hand, they may form an important factor in diminishing the damages where they affect a permanent injury by diminishing the expectancy of life. Let us consider first those that diminish the value of a

claim. Suppose that the claimant has been struck by an automobile. He shows permanent injuries, such as total loss of the use of an arm or leg. The value of his claim is based upon the actual loss to him due to his inability to use that member. If he has lost a hand and makes his living by writing cards, he can no longer pursue that occupation. Now it is obvious that if he were able to make $20.00 per week by writing cards, and is obliged to take a position as a watchman, which pays him $12.00 per week, that his earning power has been permanently injured to the extent of $8.00 per week. Suppose the claimant is but 30 years of age. Normally he would have a claim of many years of lost earning power. But suppose that the claimant on physical examination is found to be affected with tuberculosis in an advanced state so that his expectancy of life instead of being the normal three score and ten, is no greater than two or three years. It will be seen at once that instead of estimating the loss of earning power at the rate of $8.00 per week for 30 or 40 years, it is immediately cut down to $8.00 per week for 3 or 4 years. This is a broad and typical example, but it serves the purpose. Now the conditions that affect the claimant's longevity are as varied as the ills that mankind is heir to. The value of the claim may be affected by the existence of nervous disorders, by the existence of cancer, by a bad family history, by a hernia, by alcoholism, by advanced age, or by the fact that the claimant is dependent upon others; that is to say, that he earns almost nothing and is entirely dependent upon the bounty of relatives or friends.

63. Treatment of the problem.

As this is not a treatise upon medicine, nor even upon medical jurisprudence, it is impossible to examine all

of the ramifications of the effects of particular diseases. It must be understood that even one with the most profound knowledge of medical science, can scarcely say with accuracy that a claimant is certain to die, even of tuberculosis in one or two or three years. Where the injury is one that certainly would shorten the life of the claimant, but is not of so immediate, deadly, a character as to produce great ravages in a short time, the problem is still more difficult. The claim agent or adjuster of claims occupies before litigation the same position practically as a jury does in litigation. The claim agent is expected to appraise to a certain degree of accuracy the various facts that determine the value of the claim. For that reason, although definite information is extremely difficult to give, we have attempted here to render as definite as possible some of the leading principles that bear upon values. As has already been stated, pain and suffering are not commodities that are marketable and yet both the claim agent and the jury are expected to say arbitrarily that so much pain and suffering is worth so much money. Bearing in mind that the law gives merely compensation for injuries, no more or no less, one may reach a more or less accurate solution of the value of any claim, however difficult. Suppose that a claimant's earning power prior to an accident has been so far reduced by a serious case of cancer that he is barely able to live. The disease, cancer, and the claimant's earning power are two quantities so definitely related to each other that the one fixes the value of the other. If the progress of a cancer has so far disabled a court stenographer that instead of receiving his former salary of $3000.00 a year, he is obliged to take light clerical work which pays him but $1000.00, his basis of compensation for injuries received must be found in his decreased earning

power and not in his former earning power. In addition to this, if the negligence of the defendant has produced in the claimant a permanent injury, the damages are still further mitigated by the existence of the cancer, because of the probability that his life will be shortened, and that his earning power will very likely be still further decreased. The same principles apply to the other illnesses or diseases that have already been mentioned. A bad family history, or a hernia may seriously diminish the amount that should be paid to the claimant. Such factors as nervous disorders and alcoholism are more or less subtle and difficult to estimate. But there is always the possibility that one or the other may have contributed to the aggravated condition in which the claimant finds himself. This may be illustrated by an incident from an actual case.

Case I

64. Examples.

Thomas Burns, the claimant, was injured by a fall from an electric car which was entering a switch. Burns, as the car violently entered the switch, was standing upon the back platform. He was thrown to the street and struck his head. His hip was fractured. He was severely bruised and he sustained severe internal injuries. He was picked up unconscious and taken to a hospital where he remained unconscious and in a state of delirium more or less constantly during three months. At the end of this time he began to mend, and in the course of some seven months was discharged from the hospital and was able for a space of four weeks to attend to the same duties as he had performed before. At the end of this time however, his physicians noticed and the claimant himself became

conscious of a gradual tightening of the skin. At the end of three months more, the disease that had taken hold of him had resulted in a complete loss of the use of his members. He was returned to the hospital, his condition of paralysis daily becoming more acute. He soon became unable to move any of his limbs.

65. Analysis of claimant's condition and history.

In the case under discussion, the actual negligence of the defendant railway company was difficult to prove. But let us assume for the moment that negligence could be fastened upon the railway company, and attempt to discover the various facts that affected the value of Burns's claim. The seriousness of his condition was beyond dispute. An investigation of the history of the claimant disclosed many factors of importance in appraising this claim. Burns at the time of the accident was forty-five years old. He had been a hard drinker all of his life and was frequently intoxicated. He was a man of considerable ability and yet had drifted lower and lower in the social scale and in earning power until he had difficulty in securing $15.00 per week. He consumed large quantities of whiskey daily. At the time of the accident he was somewhat under the influence of liquor. Now, assuming that a perfectly healthy man had met with so severe an accident, we are bound to investigate as far as it is possible to what extent his injuries would have resulted under such conditions as the one under discussion. That the most healthful person would have been injured and seriously injured, is beyond doubt. That a perfectly normal person after having recovered from these injuries would have been affected as the claimant was, is a matter that can scarcely be determined. The disease from which Burns suffered, it happened, was a very myster-

ious one, of which medical science records but few instances. It was proved that two cases were on record in which the condition might have been attributed to hard drinking on the part of the patient. There were several instances in which the same condition had been produced as a result of some typical railway accident. Here are two conflicting possibilities that the claim agent has to solve as best he can. Of this much, we are certain: if the case were handled properly, and Burns's counsel could prove negligence on the part of the railway defendant, he would then have the problem of presenting to the jury these two possibilities. Either that the very serious permanent injuries might possibly be the result of the accident or that they might be due to the claimant's previous history. In all probability, a jury would steer a middle course. It might not give Burns all that he asked for. It would beyond peradventure give him something and very likely an extremely large verdict. This is as good an instance as could be desired, of the manner in which alcoholism or family history might play a considerable part in mitigating the damages to be paid to the claimant.

66. The age of the claimant.

The age of the claimant is in all cases a very important factor, both as affecting his earning power and as affecting the seriousness of his injuries. It is also of importance in determining in a case of permanent injuries the length of time during which his loss will continue and for which he should be compensated. These are items that may be calculated mathematically. If a man might live thirty years and earn $30.00 per week his loss is 30 times $1440. If, on the other hand, he is fifty-five, or sixty years of age, his expectancy of life may be reduced possibly to ten years, in which case the

multiplication instead of being by thirty, is by ten. It must be understood that one of the great factors in determining how great a loss a claimant has suffered, is the loss of earning power, and this factor is more largely modified by diseased conditions than by anything else. It has been said many times already in the course of this work that the basis of the claimant's right to compensation is his loss. He is to be made whole for the loss that he has suffered. One of these losses and an important item in determining the loss, is the claimant's earning power. Now, if the claimant has not any earning power, one of the items of compensation is eliminated. Suppose that the claimant is fifty years of age, and so feeble that he is dependent upon his children for support. To make the case stronger, suppose that he is unable to render any services at all by which he might contribute to his own maintenance. In that event, he has no earning power and if he is injured through negligence, he can make no claim based upon his earning power.

67. Difficulty of this investigation.

We must leave the discussion at this point with the thought that the factors that we have just been considering are the most difficult to consider that the claim agent can be faced with. Many of the facts will be hard to discover and it is only by patient and careful investigation that all of the factors that may either increase or diminish the value of the claimant's demand can be properly estimated. The order of investigation so far as we have gone is this. First, is the defendant liable? Second, what is the nature and extent of the claimant's injuries? Third, what are the circumstances that may reduce the claimant's demand?

68. What increases the value of a claim?

Let us now consider the facts and circumstances that may enhance or increase the claimant's right to compensation.

The factors that tend to decrease a claimant's compensation are in many instances those that increase it. They are often merely the same question looked at from a different point of view. When a claimant has been hurt and the question is, to how much his injury entitles him, one of the principal questions bearing upon the amount that he should receive is his occupation. The reason for this is, that individuals, like commodities, have varying values. A person who can earn $100,000 a year has an annual value of $100,000.00 and the interruption of his activity by an accident produces a loss proportionate to the amount he could earn if he were not hurt. Fortunately for the claim agent, the number who can earn $100,000 per year is very limited. The sums representing earning power in the ordinary accident case vary between $5.00 and $25.00 per week. They may exceed this amount to any extent, but this is unusual. The plaintiff's attorney in proving to the jury what his loss is, insists very largely upon the amount that the plaintiff or claimant could have gained. It does not require any great perspicacity to understand that where the injuries are permanent the occupation of the claimant is a very serious factor in determining the value of the claim.

In adjusting a claim for permanent injuries, the occupation of the claimant and his age are directly related to each other, because the loss of the claimant is estimated by multiplying his expectancy of life by the amount he could have earned if his earning power had continued uninterrupted. It is necessary to consider first his occupation. If he is a bricklayer, the amount

that he can average per year is perfectly definite and easy to ascertain. The same is true of other occupations and professions. The earning power is determined by the class of profession or trade. Naturally the earning power of a professional man, a successful physician or person in like circumstances, is greater than that of the ordinary laborer, and his loss is measured accordingly. It will be seen from the remarks that have already been made, that the distinction between permanent and temporary injuries is an important one. If the loss of earning power continues for only a year, the damages are measured accordingly. If the loss of earning power will continue throughout the claimant's life, whatever sum is taken as representing his earning power per week or per month, must be multiplied by his expectancy of life. This expectancy of life is determined by means of a series of tables, known as the Carlisle Tables, which show how long an average person ought to live under normal circumstances. And as the Carlisle tables are based upon an elaborate computation of mortality rates of average persons in all walks in life, and not from the average length of life in a particular calling, they are generally accepted as representing with more or less accuracy the expectancy of life at any given age. This length of life of the average person may be diminished or increased by circumstances. It will be natural to suppose for example that a person who is in an advanced stage of tuberculosis will not live as long as a perfectly healthy person of the same age. The principle is the same whatever the disease to which the claimant may be subject. Each affects the length of life to a greater or less extent.

69. Dependence of others on claimant.

An important factor to be considered as bearing upon

the value of the claim, is whether or not there is anyone dependent on the claimant. This is an important inquiry for the following reasons: Where a man or woman claiming damages for an injury, is unmarried, whatever right he may have to compensation is peculiar or personal to himself. There is not the question of taking care of a family to be considered. On the other hand, if the claimant were married or is the sole support of a mother or father or other person dependent upon him or her, the right of action may be twofold or threefold. That is, there may be two or three persons injured by the destruction of the claimant's earning power. For example, there is a right of action, that is to say, a right to sue, belonging to the wife of the claimant and to his children, although in many states by statutes, this right of action must be exercised in a single suit. A husband has likewise a right of action based upon the value of his wife's services to himself, so that the dependence of others upon the claimant, constitutes an important question that must be thoroughly investigated by the claim agent or adjuster.

70. Settlement should include all claims for the injury.

It is not to be supposed that this is merely an academic discussion of possible matters that may come to an investigator's attention. It frequently happens that there are three claims arising from a single injury and that an adjuster fancying that he has included all in one settlement, has taken a release from only one of the parties, for example, from the person injured, or from the wife of the person injured. A case in point was like this. Henry Robinson was driving a horse and carriage along Main Street about dusk in an entirely proper manner and upon the right side. When he was midway between Third and Fourth Streets, an

automobile dashed from the opposite side of the street and crashed into Robinson and his team. Robinson was hurt somewhat seriously, and presented a claim for damages, which the agent of a casualty company promptly adjusted, and went to his slumbers fancying that the incident was closed. It happened, however, that in the case under discussion Robinson was driving a team for his employer, who was the owner of the horse and carriage. The claim agent consequently received a demand from an attorney within a few days making a claim for the injuries to the horse and for the value of the carriage which was destroyed. The question here is not that the claim agent might have killed two birds with one stone, or that he might have prevented the owner of the horse and carriage from recovering what was rightly due to him. As a matter of fact, both settlements were extremely reasonable. But the situation could have been as serious as any one chooses to imagine it.

One might settle on a basis intended to cover all possible injuries and losses, and find that he had only settled with one of five possible plaintiffs. It is, therefore, wise to be fully acquainted with the various statutes that give a right of action for injury to a particular individual. We can indicate these matters but briefly. Normally, the wife may sue for injuries to the husband or for his death, and conversely, the husband may sue for injuries to the wife, or for her death. Likewise, children may sue for the death or injury of a parent, and a parent may sue for the death or injury of his children. In the case of very young children there is an additional complication introduced by way of imputing to parents contributory negligence for permitting infants of tender years to run at large where they may unwittingly stray into danger. In

the same way, by statutes, other persons who are dependent upon the person injured or killed through negligence have a right of action based upon the loss to themselves, and it must be understood in this case that one who is suing for his own pecuniary loss due to an injury to someone else, recovers the exact amount that he has lost, and not the pain and suffering to which the other person has been put, as that is a right peculiar to the other person. Again, the right of action for injuries to an individual survives his death, and belongs to his executors, or administrator. In other words, the estate of a person who has been killed, if he has no wife or children, has just the same right to recover as the deceased would have had if he had lived.

71. Statutes of limitation.

In this connection, we must give some consideration to what are known as statutes of limitation. These statutes mean that a person who has been injured, must bring suit to enforce his claim for damages within a limited period. This period varies in different parts of our country. A typical case may be taken. In one of the western states, an action to recover for the death of a person, due to the negligence of the defendant must be brought within one year after death. A person who has been injured because of negligence must bring his action within two years. For specific information in any particular jurisdiction, the reader is referred to the statutes in the various compilations, revisions, and digests of the various states.

72. Foreigners residing abroad.

Another peculiarity in factors that help to determine the value of a claim lies in the fact that in many states foreigners residing abroad cannot recover damages for

the death of other relatives or members of their family by negligence in this country.

73. Sex of the claimant. Menopause period.

The value of claims presented by females is dependent also upon the consideration of facts that are due to the sex of the claimant. One of the most important of these is injury to a woman during the menopause period. Because of the various dangers that beset women during this time, the estimate of damages arising from a hurt under such conditions, is extremely complicated and difficult. In the case of permanent injuries, the same tests may be followed here as in cases where the condition is used as a means to mitigate damages. Permanent injury may sometimes be attributed to the fact that the woman at the time of her injuries was in this critical condition, or might have developed permanent injuries, irrespective of the accident. On the other hand, there is equally the possibility that the woman's health might have continued unimpaired and might have suffered no ill effects whatever from her condition had it not been for the accident. In such questions as this the estimate of the damage done must be based in a large part on medical testimony. The purpose of this chapter has been served, which is to call attention to this matter as a fact that may have some bearing upon the value of the claim.

74. Pregnancy.

Again, an injury to a woman may occur during pregnancy. It goes without saying that injuries under such conditions are in the highest degree dangerous. The condition itself is one that can readily be made the basis of fraud, and it is likewise one in which most of

the facts are dependent entirely upon careful medical testimony.

75. Summary.

Let us now summarize briefly the results of our observations under the head of mitigation or enhancement of damages. Recalling again that the basis of recovery of anyone who presents a claim for injuries to himself or to another, is compensation for the loss sustained, we can see readily enough that the gross loss to the claimant is the total amount of damage that he can prove. Adding all of the factors that make up this loss, and setting them on one side of the account, we should then add on the other side all of the facts and circumstances that tend to diminish this loss, such as the existence of diseases, the existence of a condition that might have produced the claimant's present state, the advanced age of the claimant, his lack of earning power, and taking the sum of all these, we may subtract them from the total loss in order to get at the net loss to the claimant. On the other hand, certain facts tend to enhance the value of a claim beyond the amount at which it would normally be appraised. These are, we have seen, the unusually lucrative occupation of the claimant, his great earning power, the dependence of others upon the claimant, by which the injury may be not to the claimant alone, but to several others beside himself. In addition to this, the claim may be enhanced in the case of female claimants by the fact that they are passing through the critical periods either of menopause or pregnancy. Therefore, we add to our order of investigation. 1. Is the defendant liable? 2. What is the nature and extent of the claimant's injuries? 3. What are the circumstances that may reduce the claimant's demand? 4. What are the circumstances that may increase the claimant's demand?

CHAPTER VII

FACTS INFLUENCING QUESTIONS OF SETTLEMENT

76. Subordinate factors affecting the value of a claim.

We have considered in a general way most of the actual questions and circumstances surrounding the happening of an injury and the subsequent condition of the claimant. Let us now proceed to examine some of the vaguer forces that play a more or less important part in determining the value of a claim.

77. Personality of opponents.

One of the first questions with which the investigator is confronted when a claim has been presented to him for adjustment is the personality of his various oppo-

nents. These are principally three, the claimant himself, the claimant's physician, and the claimant's counsel. In the first place, assuming that from the moment the claim is presented there is every reason to believe in the good intentions of all parties concerned, obviously, the need of being constantly on one's guard against fraud, at least, is remote. Certain facts, however, tend to confirm us in the belief that one party or the other is or is not playing fair. If the attitude of the attending physician from the first is that damages must be awarded to his patient, and if in addition to that, he presents an excessive or apparently excessive charge for medical services rendered, there is reason for suspecting that he is interested in seeing that the claimant is paid. In that event, all facts stated by him have to be checked up very carefully.

78. Claimant's counsel.

The same circumstances must be considered also in connection with the reputation, character, and ability of the claimant's counsel. While it is never fair and never honest to take advantage of the mediocre abilities of one's opponents for the purpose of preventing them from getting what is justly due, there are many cases so close to the line that payment or non-payment is not in the realm of legal redress, but is rather a matter of economics or of humanity. It must be understood that a person's wound is no less grievous and hurts him no less if he himself has been the principal factor in producing his injuries. But, however grievous his hurt, the question of whether an innocent party, such as the owner of the car from which he deliberately threw himself shall pay him compensation for his hurts, is entirely a matter of the humanity and good nature of the defendant. Cases upon the border line even of

humanity may be influenced so far as their settlement is concerned by the counsel retained by the claimant. The ability of counsel may make a doubtful case a good one. An argument well presented may seemingly change the law from non-liability to liability. So that the reputation, character, and ability of the claimant's counsel play an extremely important part in determining the question of settlement or no settlement. Again if the damages asked by either of the parties, the claimant or his counsel, are grossly excessive either in view of the liability or in view of the injury sustained, an intention is shown to make as much profit or capital out of the claimant's injuries as the circumstances will permit. In which event the claim will probably be disregarded altogether or will be scrutinized with the greatest care.

79. Policy of the company. The public.

We must consider here also the general policy of the company itself toward the public. There are sometimes certain circumstances that impel a company to do all in its power, even at the expense of settling doubtful claims, to avoid litigation. Where these are the circumstances, there are periods when the utmost leniency is displayed in the payment of claims. Vice versa, in times of financial stress, when a company is constantly harassed by expensive litigation, or for other reasons, claims are scrutinized with the utmost rigor, and the rule is often stated in the formula "contest rather than pay."

80. Injured employees. Their legal rights.

Some mention has been made of the difference between liability toward a servant or employee who has been injured at his work and that of a stranger or casual member of the public. It will be recalled that as

a general rule the position of the employee is not so favorable when he asks compensation for injuries received at his work as is that of a third person, the reason for this being that he is supposed to have assumed certain of the dangers when he accepted his position at a given salary or wage. Naturally, this does not impress the great body of workers as an entirely fair proposition and agitation has been going on for nearly a century with a view to eliminating this condition. The initiative is in many cases taken by the employing company itself or by the employing individual himself. A sliding scale of compensation is sometimes adopted which is given to any workman injured, regardless of whether he contributed to the injury or not. Again, companies frequently pay the salary of an injured employee while he is recovering from his injuries, and all or a part of his doctor's bill. This brings us to a consideration of the legal questions bearing upon the value of a claim when the person hurt is an employee. To do this, we shall have to discuss somewhat fully the general principles that define the liability of an employer when his employee is hurt. Let us understand first of all that there are some jurisdictions or states in which the employer is bound only by what is known as common law liability. Under this system of liability, what is known as the fellow servant doctrine or rule, applies, with slight modification.

81. Law of employer's liability.

In a second class of cases, the employee when injured is entitled to compensation regardless of whether his injury is due to the act of a fellow servant or not, but not where he has been hurt either because of a pure accident due to no one's negligence, or because of his own

contributory negligence. In a third class of cases, an employee who is hurt in the course of his employment is entitled to some payment no matter how he got hurt. While this last state of affairs is the aim toward which most groups of working men strive, it is almost impossible that such a favorable doctrine could obtain fully in the United States because of certain prohibitions in the Constitution, so that the last class of cases mentioned happen only in England and on the Continent.

82. Common law liability of employers.

Let us consider now those cases in which the legal responsibility of the employer is only what is known as the common law liability. At the common law, an employer is liable to his employee who is hurt while working for him, only in certain limited cases. In the first place, the parties, the employer and the employee, may agree before hand upon the liability of each in case of injury. The right of action of the employee then would depend upon his contract if he were injured. The general principle is, that where there is no agreement, the employer can be held liable to his employee only for injuries directly produced by himself. For the injuries that an employee may sustain are of four kinds. First, from the nature of the employment. Second, from negligence of the master. Third, from negligence of a fellow servant. Fourth, from negligence of some third person. If an employee is injured merely from one of the dangers incident to the calling that he has undertaken, he must bear the loss himself, for he is taken to have assumed this risk when he accepted his position. If a third person injures an employee, the third person being the one who has done the wrong, is the sole person responsible. Such an incident would

be where an unruly passenger threw a conductor from a car and injured him. The conductor in such a case might claim damages from the person who threw him from the car, but not from his employer. If a motorman of a car produces injury to the conductor, this is an act of a fellow servant and the employer at common law cannot be held liable. The extent of the employer's liability then is measured entirely by his own negligence or want of care. The facts that show want of care may be summarized very briefly for the present purpose. The employer is bound to provide his employee with a safe place in which to work. He is bound to provide him with tools and machinery which are up to the ordinary modern standard of efficiency. He is not bound to provide the very best, but only what is the ordinary usage in that particular employment. He must select his servants with skill and care. For example, if an electric railway company selected a motorman who was notoriously drunken and reckless, a conductor injured by an act of such a motorman could recover against the railway company. The employer also must see that his servants and employees are not exposed to unnecessary dangers. This practically is the extent of the employer's liability at common law. Let us examine the doctrine with somewhat more detail.

83. Common law liability of employers. General principles.

The only instance in which an employee stands in as favorable a position toward his master or employer if hurt, as a third person, is where the master has personally done the act resulting in injury to the employee. Ordinarily, the employee of a railroad has not the same right to recover for injuries to himself as a passenger would have. The test of the master's liability is his negligence, not any possible dangers that the employ-

ment itself may involve. Now, as to the extent of the master's liability, he is expected to be a normal and reasonable person. He is not held to the highest care nor is he bound to insure his employees from harm. He is only held to the exercise of reasonable care in looking after the safety of his employees. The duty of the master is to use reasonable care to prevent accident or injury to his workmen. It is failure in this duty that will make the employer liable. This much may be asserted as a test, that the employer's duty toward his servant is summed up in the phrase, "reasonable care." This, it must be understood, is a shifting and flexible phrase. What is reasonable care toward men employed in delivering spring water might be the grossest negligence toward men employed to transport dynamite or nitroglycerine. The meaning of this is so obvious that it need not be dwelt upon. A peculiar instance of what may be involved in the employer's duty to protect his servant is the following:

A railroad company sent an employee to make some repairs on the line of its road, a distance of some nine miles, in extreme cold weather. The railroad company was aware that the employee was not properly clad, nor provided with food for exposure to extreme weather, and that the employee expected to be sent for at the conclusion of his day's work. The company failed to do so, and the employee, in walking several miles to a village, suffered permanent injuries from exposure to the cold. This was considered a failure on the part of the railroad company of its duty to protect its servant and it was held liable as for negligence.

84. Negligence as to young or inexperienced servants.

It has already been suggested that the words, "reasonable care" may mean a much higher responsi-

bility in a case involving known dangers than in a case where the dangers are slight, and the responsibility of the employer in a case of this character begins with the hiring of the servant or employee. If a master hires for dangerous work, for example, on a railroad or near a blast furnace, either a very young or very inexperienced person, he renders himself liable for anything that may happen to the minor or inexperienced person. In the case of minors, the contract of employment should be made with the parents. The test of liability where minors are employed for dangerous work has been given as follows: "Persons who employ children must anticipate the ordinary behavior of children, and must take notice of their lack of judgment, and must exercise greater care toward them than is required by law to be exercised toward and for adult persons." Furthermore that "It is an actionable wrong for a person to place or employ children of such immature judgment as to be unable to comprehend the danger to work with or about a machine of a dangerous character, likely to produce injury." Instances of acts that may make the employer liable are, taking a boy who has been employed by a railroad company as a shoveler, and putting him on a train as brakeman, where he is injured while coupling cars; setting a minor to do work beyond his or her strength, and the like. It should be understood that the liability of the employer is fixed, whether he himself does the act directly resulting in injury, or whether the act is done by some superintendent, or vice-principal, whom he has entrusted with the duty of managing his operations. Where the relation of the parties is such that the employee injured has been working for an independent contractor, although the work is being done for a municipality or other corporation, the employee who is injured must pursue his

remedy against his direct employer, namely the independent contractor. An instance of where an employer is held free from liability for injuries to his servant, is where the injury is entirely due to the criminal or wrongful act of some third persons. For example, if wreckers derail a train, a railroad company is not liable for resulting injuries to employees.

In any event, the employer is only liable where actual negligence may be imputed to him. He is not held liable for pure accidents. A railroad engineer was killed because of the collision of his engine with a bull on a railroad track. This was held to be an accident which no foresight nor prudence on the part of the railroad officials could have prevented. The proposition is simply this, that an employer cannot be held liable for negligence if an employee is injured as the result of a pure accident. In general, the master is liable for all injuries to his servant produced by the acts or omissions of other servants who are placed in control of those injured. The master is not permitted to evade this liability by contract. He cannot contract in advance to be free from the consequences of his own negligence. It is permitted, however, to employers to enter into contracts by which employees who accept benefits from relief associations, thereby release the employer from claims for damages.

85. Duties of the employer.

The first and most important duty of the employer is to provide the employee with safe appliances or machinery to work with, and a safe place to work in. This does not mean that he insures the use either of the place or of the machinery. It is incumbent upon him, however, to keep the machinery and other appliances in proper order for use, and to provide against injury

to employees because of defects in the machinery or appliances. The master is bound only to discover such defects in his machinery as could be known by the exercise of proper care and diligence. The care required here is likewise reasonable care, or care according to the circumstances. If the employer provides such machinery or appliances as a prudent man would select for his own use, he has fulfilled his entire duty.

86. Effect of entrusting duty to others.

The employer cannot escape liability by entrusting his own responsibilities to others. If a master delegates to a servant or an agent the duty of providing machinery or appliances for his employees, he assumes the burden of any mishap that may occur through the act of his agent. The failure to furnish a safe place or proper appliances results in liability for the master. Embraced in the duty to furnish a safe place to work in is the duty to provide the employees with competent fellow servants. Negligence in the choice of fellow servants for one's employees may produce liability to the same extent as negligence in the choice of a place to work in.

87. What kind of appliances must the employer furnish?

It is only required that the machinery or appliances furnished to employees be reasonably safe and suitable for the purpose intended. The employer need not procure the very latest, the very best, or the very safest apparatus. It is only necessary that it be reasonably safe. This, however, depends largely upon the nature of the employment. Unusual dangers require unusual precautions and as has already been said, what is the highest care in the handling of milk is the grossest negligence in the handling of electricity.

The test generally applied is, is the employer adopt-

ing the customary methods employed in his particular business? Therefore, in an attempt to discover whether or not negligence exists because of failure to provide safe appliances, it is always necessary to ascertain the general usage in that particular trade or occupation. Typical cases are injuries to sailors by falling through open hatchways; failure to guard an elevator shaft; failure to provide guards for dangerous machinery; leaving cog wheels exposed where workmen are compelled to pass constantly. The cases upon this subject are so numerous that for specific instances, readers can only be referred to the law of negligence, where a case may be found for almost any conceivable circumstance resulting in injury to employees. It is immaterial whether the appliances furnished by the employer to his workmen are animate or inanimate. It is just as much negligence to provide an employee with a dangerous horse as with a defective locomotive.

A distinction exists between dangers that are open or obvious and dangers that are latent or hidden. If an employer sets an employee at work on a boiler which explodes because of a defect, the defect, to render the employer liable, must be such a one as the employer could have discovered by the exercise of reasonable skill and diligence. If the employer furnishes the employee with machinery which to himself is obviously dangerous, he is liable for any mishap that results. The employer is bound to make inspections of his machinery and to see that they will stand the test of the strain or work to which they are to be subjected. The same principles are applied in cases of master and servant for the determination of negligence as in any other case. The care required is reasonable care and the injury must be the proximate result of the master's negligence. Where an employee is put at a dangerous employment,

it is the duty of the master to warn his employee of the danger and to instruct him how to avoid it.

88. Fellow servant doctrines.

We now come to the principal modification of an employer's liability for injuries to his servant. This is that the injury resulted from the act of a fellow servant. If the employer has selected his servant with care and has not endangered one servant by placing him in companionship with a reckless or careless fellow workman, he has done his full duty by the employee. This defence is open to any employer. Namely, that the injury has been the result of the act of a fellow servant. It is to be recalled that we are dealing now with the common law liability of the employer. We shall treat hereafter of the statutes that entirely relieve the employee of the burdens of this doctrine. If the master has been negligent in employing servants, the other employees have an action for any injury that may result from their carelessness. The master again is only required to use reasonable care. A ship owner who puts an incompetent person at the wheel by reason of which a collision occurs, and some of the sailors are killed, is liable for such negligence. The various defects in servants that may lead to liability are inexperience, bad habits, intoxication, and similar vices.

In general, the master's liability is the same if the act that causes an employee injury is due to the negligence of his superintendent or vice-principal, as if he had done it personally. On the other hand, if the injury is due to the act of a fellow servant, the master, where the common law liability remains unchanged cannot be held liable. If the master and a servant both did an act which results in injury to another servant, the master is liable.

89. Fellow servants, those engaged in common employment.

An employer seeking to avoid liability for negligence on the ground that the injury to his servant was due to the act of a fellow servant, can only avail himself of this defense under certain circumstances. The first requisite is, that both servants must have been engaged in a common employment, and that they were engaged in that common employment when the injury happened. For example, Smith and Brown are engaged in operating a steam hammer. Brown carelessly lets the hammer descend too soon, and a piece of metal flies out and injures Smith. Smith has no remedy against his employer for the injury caused by his fellow servant while they were engaged at a common employment. But suppose that the employer calls Brown and says, "Take Smith and three other men and have them repair the hammer." Brown has changed his employment for the time being and has become a superintendent or vice-principal, and the workmen are no longer fellow servants of Brown. If he causes them injury, the employer is liable. This is a broad instance and the problems in practice are not quite so easy to solve. But the test of common employment may be applied by asking the question, "Do the two or more servants hold the same grade in the employment?" If they do, they are fellow servants.

A moment's thought will disclose that the theory is, that risks from the acts of fellow servants are matters that a man of reasonable mentality could foresee and assume when entering the employment. The possibility that one's comrade may be negligent is a part of each man's experience. It is assumed that the danger attendant upon the work fixes the amount of the workman's compensation, and he is supposed to a certain

extent to be paid in advance for the risk that he assumes.

90. What is not a common employment?

It need scarcely be added that two men are not in a common employment merely because they work for the same employer. The charwoman of the employer is not the fellow servant of the engineer who sees to the running of his factory, nor are the sailors who man his ships fellow servants of the book-keeper in his factory.

91. Association as a test of common employment.

A peculiar phase of the common employment doctrine applies in certain of the United States. In order to establish that a person has been injured by one in a common employment it must be shown that the employment brought the servants into such association with each other that they exerted upon each other a certain amount of influence that might act as a safeguard.

92. Specific instances of common employment.

Mill hands working in the same factory are fellow servants and the employment is common; the same is true of the members of a train or railway crew; the workmen erecting a building; a switchtender and a locomotive engineer; a brakeman and a switchman, and the like. Instances might be multiplied indefinitely, but the illustrations given show in a general way the tests applied.

93. Risks which the servant is considered to have assumed.

Wherever an employment is manifestly dangerous even though carried on in the usual and ordinary way, any employee who undertakes the work assumes the

risks that go with it. If a servant obeys directions that lead him into places manifestly dangerous, he assumes the risk of whatever may happen. If, on the other hand, the servant is led into danger through the instructions of the master, the master is liable if he is injured. The employee is bound to use prudence in discharging his duties. And the rule here also is that the greater the risk, the greater the care required of the employee. For example, a carpenter who works on a scaffold, assumes the risk of his position. If he works on an elevated platform which is unguarded and falls, he has no right of action. If, on the other hand, the scaffold should fall because of defective construction, the employee would have a right to recover. One of the risks that is assumed under the common law doctrine is that the employee's fellow servant may be careless. He assumes no risk that his superior officers will be negligent or incompetent. The knowledge by the servant of the dangers incident to the work he has undertaken is itself an answer to any possible action he may have for injuries received.

We have seen that the servant or employee is supposed to have assumed whatever risks may be incident to the service to be rendered. Latent defects in tools or machinery furnished, that result in injury to the employee do not form the basis of liability on the part of the master. On the other hand, if the defect in the machinery is obvious to the employee, he assumes a danger of which he must be conscious. But he does not assume risks of which he has no notice. Nor must he be subjected to greater risks than the particular business usually involves.

The doctrine of assumption of risk, however, is itself subject to modification. If a statute requires an employer to guard dangerous machinery, he cannot escape

liability for injury to a servant, by claiming that the latter had assumed the risk. It has been said that such a statute "has merely crystallized the demands of ordinary prudence, in requiring that cogs, gearing and other machinery shall be covered. An injury from machinery, open and uncovered is not liable to occur, without the occurrence of some accident or unexpected event, such as a slip or a miscalculated move. And it is for the very reason that such things may in numberless unexpected ways plunge a workman into danger, without fault of his own, that prudence requires proper safeguards to be supplied to prevent accidental contact with moving machinery. To hold that a prior slip or an accidental movement which brings an unfortunate workman into contact with uncovered cog wheels is to be considered as the proximate cause of the resulting injury, would be to practically nullify the provisions of the law made to protect him against such risks."

The accident to which reference has been made happened in the following manner. The plaintiff was employed by a rubber company and at the time of the accident was standing upon a small platform beside a machine, attending to his duties, when a fellow workman accidentally pushed a loaded wheelbarrow against the platform with such force as to cause the plaintiff to lose his balance. In the effort to recover, one hand was thrown out, went into the uncovered cogs and was crushed. He recovered a verdict of $2500.

It will be seen at once that cases of this kind destroy very largely an employer's immunity, whether based on the principle of assumption of risk, or on the fellow servant doctrine. The conclusion it may be added is eminently just.

There is no special need for examining at this place the effect of contributory negligence by the employee.

If an employee is injured and contributes to his own injury, he forfeits all right to recover. If a servant continues to work after becoming aware that his work is dangerous, he assumes the risk of injury. If, however, he notifies his employer of defects in machinery or apparatus, and remains a reasonable time afterward upon the employer's promise to make repairs, he does not lose his right to recovery. This in outline is a summary of the principal situations that may arise where an employer is held only to his common law liability.

94. Modification of common law liability. Employer's liability acts.

Now, this liability has been modified in almost all instances to a greater or less extent. The complicated rule of law to the effect that an employer who seeks to escape liability on the ground that an injury to an employee is due to the act of a fellow servant, must show that they are acting in a common employment, is a doctrine somewhat difficult even for lawyers to apply, and we have discussed it as fully as the scope of this work permits. It will be seen that this system of law entails some hardship upon workmen. For one reason, the rights of an employee are much less than those of the average member of the public. As a consequence, certain modifications of this law have been made in the shape of what are known as workmen's compensation acts. These acts introduce certain modifications into the law of master and servant. The modifications may be very sweeping or they may only mitigate the severity of the common law in certain instances. The English act of 1880 modified common law liability for injuries to a servant or employee in the following instances. An employee was allowed to recover for injury because

of defects in the machinery, plant, or places of employment, provided the defect is due to the negligence of the employer or his failure to discover or remedy it. This includes the negligence of any person whom the employer has entrusted with this same duty. Secondly, a remedy was given if the injury to the employee occurred because of the negligence of any vice-principal, that is, of any person entrusted by the employer with the duty of superintendence or direction of the work. Third, the employee was given a remedy if the injury occurred through obeying the instructions of the employer, which instructions were defective and which the employee was bound to obey. The fifth case was one allowing a remedy to the employee where injury was done to an employee through negligence on the part of any person in the services of the employer entrusted with the charge or control of any signal, points, locomotive engine, or train upon a railway. In 1897, this law was still further modified by giving compensation to all injured employees in certain employments without reference to negligence or contributory negligence. The sole fact of interest in these acts was that the employee had been hurt while at work. Automatically, he was entitled to a certain compensation.

By legislation of 1900 and 1906 in England, the right of an employee to compensation for injuries received in the course of his employment become practically universal, with the result that in England an employer is practically an insurer of the safety of his workmen. It is to be understood, however, that the compensation provided by the act is a sliding scale proportionate to the kind of employment and the amount of remuneration, and it applied only to persons who earned less than $1200.00 a year. It is further to be understood that in England the huge verdicts for personal injuries that

are common in America, are practically unknown. The compensation provided by the act is only intended to prevent the workman and his family from being thrown practically into the poor house when a serious injury occurs. It is beside the purpose of this work to attempt to treat exhaustively the various conditions under which a workman is entitled to compensation in England. We have discussed the matter thus far only to make clear the tendency of the Workmen's Compensation Act. We shall deal more particularly, however, with the acts upon the subject of employer's liability in the United States, and we shall add as an appendix a reference to the various laws enforced in the United States and foreign countries, so that they may be consulted when the readers of this work may desire.

95. Discussion of employer's liabilty in the United States.

The common law doctrine of master and servant applies in most jurisdictions of the United States, but not with any great severity. The courts have shown a disposition to increase the liability of the employer and in some states, the doctrine of master and servant has been entirely abrogated. The most sweeping laws which are based largely upon the latest English Act of 1906, have been adopted in the states of New Jersey and Washington. The Federal Laws of April 22, 1908, and May 30, 1908, have practically abrogated the doctrine of common employment and provide generally a system of liability of employers for injuries to their employees. These laws, however, apply only to interstate commerce, to federal works, to railroads in territories, and to government employment. Modified employer's liability laws have been passed in Alabama, Massachusetts, and Pennsylvania, and a sweeping act has been passed in Colorado. This is as complete a

discussion of the question of employer's liability as can be given at this place. We have added, however, as an appendix to this chapter, a list of all of the employer's liability laws in force in the United States, that will at least indicate where the information can be found.

The laws in the United States vary greatly in the extent to which they have modified the common law doctrine of master and servant. In some states, the common law rule is enforced, in others the common law rule has been entirely abrogated. In still others, the common law rule has been modified to the extent that the mere fact that one is injured by a fellow servant, does not deprive him of a remedy against the employer. It should be understood that the list of laws given in this chapter does not include all of the legislation regulating the operation of factories and mines. In those cases certain special rules apply, failure to observe which constitutes negligence. The object of this list is simply to furnish as complete a list as possible of the statutes of the United States that fix the liability of the employer when his employee is injured, where the statutes modify or abrogate the common law liability. Statutes regulating hours of labor, particular trades or professions such as mines are not included.

EMPLOYER'S LIABILITY ACTS IN FORCE IN THE UNITED STATES

Alabama.—Code 1907, section 3910. Sub-division, 1.

Arkansas.—Laws of 1907, page 162; Laws of 1911, act 88.

California.—Statutes of California, 1911, page 796, chapter 319.

Colorado.—Laws, page 249, chapter 113.

Florida.—General Statutes, section 3150.

Georgia.—Code, 1911, sections 2782–2784.
Indiana.—Laws of 1911, page 145.
Iowa.—Code supplement 1907, section 4999, Amended Laws of 1911, page 200.
Kansas.—Laws of 1911, page 382.
Maine.—Laws of 1907, page 336.
Massachusetts.—Revised laws, chapter 106, section 71. Statutes 1909, chapter 514, section 127; 1911.
Minnesota.—Laws of 1887, chapter 13: General Statutes 1894, section 2701; Revised Laws 1905, section 2042.
Mississippi.—Constitution of 1890: section 193. Code 1906, section 4056: Laws of 1908, page 204, chapter 194.
Missouri.—Revised Statutes 1899. Section 2864. Amended 1905, page 135.
Montana.—Laws 1903, page 156, chapter 83. Laws, page 47, chapter 29.
Nebraska.—Compensation statutes 1909, chapter 21, section 3.
New Jersey.—Laws of 1911, page 134, chapter 95.
New York.—Consolidated laws, chapter 31, article 14. Chapter 31, article 18. Laws of 1910, chapter 674.
North Carolina.—Privilege Laws 1897, page 83, chapter 56. Revisal (Laws) 1905, section 2646.
Ohio.—Laws of 1911, page 524.
Oklahoma.—Constitution article 9, section 36.
Oregon.—Laws of 1911, page 16, chapter 3.
Pennsylvania.—Act of 1907, June 10. P. L. 523.
South Carolina.—Constitution article 9, section 15.
South Dakota.—Laws of 1907, chapter 219.
Tennessee.—Laws of 1907, sec. 3910. Sub-division I.
Texas.—Laws of 1905, chapter 163.
United States.—Employer's Liability Act. Act of

Congress, June 11, 1906, chapter 3073, 34 statutes 232. United States Compensation Statute supplement 1909, page 1148 (enforced in inter-state commerce, in the territories, and as to government employees).

Utah.—Revised Statute 1898, section 1343: Compensation Laws 1907, section 1343.

Vermont.—Laws of 1911, page 97.

Virginia.—Constitution Article 12, section 162. Code of 1904, page 259. Code of 1904, section 1294K.

Washington.—Session Laws of 1911, chapter 74.

Wisconsin.—Laws of 1907, chapter 254.

EMPLOYER'S LIABILITY ACTS IN FOREIGN COUNTRIES

England.—Workmen's Compensation Act of 1906.

As an instance of how far the treatment of claims may be modified by these changes in the law of Employer's Liability, the principal effects of the Washington Compensation Law are summarized. The introduction to this law is of extreme interest. Section I, which is called the Declaration of Police Power, is as follows:

"The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman, and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising its police and sovereign power, declares that

all phases of the premises are withdrawn from private controversy and sure and certain relief for workmen injured in extra hazardous work, and their families and dependents is hereby provided, regardless of questions of fault, and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end the civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this act provided."

The enumeration of extra hazardous works includes such a wide range of subjects that it seems to protect workmen in any kind of employment. Besides the workman himself the protection of the act extends to dependent relatives and this term likewise, includes a wide range of individuals. A schedule of contribution is provided, under which employers, according to the kind of industry in which they are engaged, pay into the State Treasury certain sums of money out of which accident claims are to be paid. Without going further into the details of this Act, it is sufficient to say that liability to pay for injuries to workmen does not depend upon the existence or non-existence of negligence. It depends solely upon whether or not the workman is engaged in an extra hazardous calling and if he is, he is protected automatically.

CHAPTER VIII

CHARACTER AND STRENGTH OF EVIDENCE

97. Evidence. What it is.

The evidence is what we depend upon to establish the facts concerning the claim. Evidence, it must be remembered, has two meanings. It has a general meaning, a sense in which all people use it, that it is anything that throws light upon any given subject, which we may term "lay" evidence. It has a secondary and special meaning, the sense in which it is used by lawyers, judges, and courts of law. The legal sense of the word "evidence" is much more limited than its general sense. When evidence is used in connection with a suit which is pending in court, it means such matters as can be proved in accordance with the technical or legal rules of evidence.

When so understood, the person who is considering the evidence, must consider it only in so far as the court will permit it to be proved. But on the other hand, when evidence is used in its general sense, it means anything that an average person would consider as helping to make up his mind as to the facts of the controversy. Therefore, a claim agent or adjuster or investigator has before him two kinds of evidence.

In the first place, where he is merely trying to determine the value of a claim, he will investigate every possible fact that will have any bearing whatever on the injury to the claimant, on his condition, and on his previous history. If the case is a close one where no moral question is involved, and his sole purpose is to make as strong a case for himself as possible, he will see that certain facts, either in his favor or in favor of his opponent are of no importance, simply because the court would never permit either party to prove them. With the evidence to be presented in court, the claim agent as a rule has very little to do. And the reason for this is that even lawyers cannot, without a great deal of study and difficulty, decide always just what may be admitted in evidence and what may not. Hence, the investigator's care should be to obtain all of the evidence that by any possibility may have any bearing upon his facts. And by evidence, we mean all kinds of proof such as the statements of witnesses, the testimony of those who have examined the ground, the testimony of those who saw the accident happen, as well as the testimony of those who know the previous history and the present condition of the claimant.

In its widest acceptation, evidence includes all of the facts that the normal mind would make use of in deciding a disputed question. For this purpose, men generally examine every available fact which they con-

ceive to have any bearing upon the subject under investigation. In passing upon a person's character, we lend a ready ear to the facts of his general reputation. That he is generally looked down upon, that his neighbors close their doors upon him, that he is suspected of dishonesty, lead us readily to a conclusion of guilt if he is suspected of theft, but this might be very difficult to prove in a court of law.

On the other hand, legal evidence is such as a court would permit litigants to present in proof of their respective claims. It is evidence, as generally understood, with something subtracted from it. The rules of legal evidence even make some parties incompetent to testify. A great proportion of the rules of evidence consists of tests by which certain facts are to be excluded as factors bearing upon the question in litigation.

98. Burden of proof.

A few of these rules are of material importance in claim work. Such is the rule as to the burden of proof. The burden of proof means simply that the party in court who asserts a fact must prove it. Thus a claimant in court asserting that the defendant, a railroad company, has injured him, through negligence, has the burden of proving the injury, a duty toward him, and the negligence of the defendant. And when the claim agent or adjuster has honestly made up his mind that a claim is unfounded, he may find some reliance in the difficulty that the claimant will find in fulfilling his obligation to meet this burden. It is always to be recalled also that the claimant must connect the defendant with the accident, that is, must prove that the defendant himself or someone for whom he is responsible produced the injury. The failure to establish this fact has lost many cases apparently won.

99. Presumptions.

Scarcely less important than the burden of proof rule, is the rule as to presumptions. A presumption is defined by Stephen, as "a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of the inference is disproved." Thus, at the beginning of an action for negligence, the presumption is that the defendant performed his lawful duties and that he commited no negligent act. Ordinarily the law does not make any presumption of negligence. But there are certain circumstances in which such a presumption arises. If two railway cars of the same company meet in a right-angled collision, and passengers are hurt, the law presumes that the company was negligent. And generally speaking, it may be said, that exposing those toward whom a duty is owed gives rise to a presumption of negligence.

100. Hearsay.

The rules as to hearsay and the like are so highly technical that they are beyond the scope of this work. Briefly the hearsay rule excludes all statements made by a person not called as a witness in the case. It is subject to numerous exceptions, among which are, affidavits, dying declarations, statements against interest, public documents, admissions, confessions, and res gestæ.

If a person who has testified in a previous trial has moved away or died or become inaccessible in any way, in certain cases his previous affidavits or testimony may be read in evidence on a second trial. So also if his testimony on a second trial differ from that on the previous trial, his former testimony may be read to

contradict him in certain cases. The same is true to a more limited extent as to contradictions.

101. Res Gestæ.

The most important exception is what is known as the rule of res gestæ. This is a loose and vague term that means the "transaction." That is, facts are admitted as proof or rather as evidence, when they may be considered a part of the transaction, or subject of litigation, whereas if they had not been such they might have been excluded as hearsay. It will be seen at once that the rule is an extremely elastic one, since it must be determined in each individual case, first, what is the transaction, and which facts may be considered a part of it.

102. Opinions.

Opinions, as a general rule, form no part of legal evidence, and likewise, are little employed in other evidence. If for example, it is desired to know whether or not a motorman was drunk at a particular hour, it is of little interest to us that a witness is of opinion that he never drew a sober breath.

103. Expert testimony.

In claim work, however, the legal rule against admitting opinions is honored more in the breach than in the observance, for no inconsiderable portion of the evidence, testimony, or proof that comes into the hands of the claim agent is opinion evidence. A large part of the medical evidence is based upon opinions, as is also the evidence as to a claimant's probable expectancy of life. Testimony as to lunacy consists largely of conjectures and opinions. Expert testimony is the chief exception to the rule against opinions and, as we have seen, it is an important exception to the claim agent.

104. Documentary evidence.

Another distinction between kinds of evidence must be noted here. It is the distinction between oral and documentary evidence. If written evidence is to be produced, it is generally required to be the original document and not a copy. But there are certain circumstances under which copies may be used. So much for the technical rules of evidence.

105. Distinction between legal evidence and evidence in general

Let us glance for a moment by way of illustration at the distinction between the two kinds of evidence. Namely, the evidence that would be admitted in court and the evidence that any average person would consider in reaching a conclusion as to any set of facts.

Suppose that a case is on trial in court in which the driver of a wagon has collided with a moving electric car. There is no direct evidence of the wagon's rate of speed at the time of the accident. It is proposed to introduce evidence to show that the driver of the wagon is on all occasions a most reckless driver, that he makes a specialty of turning corners on two wheels and that his general reputation is that of a Jehu. This evidence will be rejected by the court, as it has no bearing whatever as proof that on this particular occasion the driver of the wagon was going at any undue rate of speed.

106. The distinction illustrated.

If the case were not in court, anyone investigating this particular accident would lay the greatest stress on the man's general reputation. He would regard it as probable that the driver of the wagon on this occasion was driving recklessly and he would make that assumption the basis of a thorough investigation of all facts as to the driver's conduct immediately preceding the

accident. So that it can readily be seen that the investigator must examine all kinds of evidence. He must not concern himself with whether or not the evidence is mere hearsay; he should always state how his facts are to be proved, whether by witnesses or by hearsay. This is all that need be said for the purpose of the present work as to the difference between the evidence that may be introduced in court and the evidence that one may collect in investigating an accident and its causes.

Let us now examine briefly the various kinds of evidence. The most general division that occurs usually to the mind is the distinction between direct evidence and circumstantial evidence. This distinction can be defined better by way of illustration than by abstract definitions. Suppose that one man sees two others engaged in a scuffle. He sees the one move away from the other, draw a revolver from his pocket, and fire it point-blank at the other. This would be direct evidence, if the man who was shot died, that he had been murdered and by the man who shot the pistol. Suppose again, that a young man and young lady are found together dead. There are dark stains on the lips of both. An examination reveals the fact that death is the result of potassium cyanide. It is a well known fact that the instant this chemical enters the system of a human being, death results under such circumstances that movement or action of any kind is impossible. The room contains no vessel or substance in which the chemical might have been contained or concealed. The circumstances indicate, therefore, clearly that some third person has administered potassium cyanide to the persons who have died. This is what may be known as circumstantial evidence of murder.

107. Circumstantial evidence.

One of the most striking instances of the value of circumstantial evidence in determining the guilt of a criminal is the following. A farmer in Chester County who lived some fifteen miles from Philadelphia, was found dead in his house. It was evident from the circumstances in which he was found that he had been killed by terrific blows upon his head. The body was not discovered for two days and there were consequently no newspaper accounts of the murder for that length of time. On the day after the murder had been committed, but the day before it had been discovered, a negro stopped at a news-stand in the city of Philadelphia and asked the news-dealer for the paper containing an account of the murder. The news-dealer replied that none of the papers contained any account of a murder. The negro replied, "I mean the murder of the farmer in Chester County." The negro then went away. The following day, the murder was discovered and the newspapers contained accounts of it. Among others toward whom suspicion pointed, but of whom nothing definite was known, was the negro who had asked the news-dealer for the paper in the manner stated above, and who had been arrested. The news-dealer came forward, identified the negro and described how the day before the discovery of the murder, this particular individual had asked for a newspaper containing an account of the murder. It will be seen at once that the circumstances proved conclusively that the negro possessed information of the murder before anyone else, which made it very probable that he was the person who had committed the murder. This was, in fact, practically the only strong evidence that was used to convict him. It is as good an example of the value of circumstantial evidence as can be imagined.

Let us, therefore, make this comment. The best evidence that one can have is direct evidence. And yet, there are times when the best intentioned of people make mistakes in ordinary observations and in the direct use of their own eyes or ears. On the other hand, there are times when circumstantial evidence, as in the instance just given, is of so conclusive a kind, that it is as valuable as the evidence of ten men who could say that they saw the thing with their own eyes. A rather ridiculous instance of its use as a two-edged sword is the case related by Voltaire of the Oriental Zadig. He was accosted in the queen's gardens by some of her servants who said they were in search of her favorite horse and her favorite dog. They were in doubt whether the horse and dog had passed that way or not. Zadig began to ask questions. Did the horse have a long mane? Was it light brown in color? Did it wear golden shoes? Was its stride eight feet? Was it so many hands high, and so on, to all of which the servants replied in the affirmative. Zadig then replied that he had not seen the horse, whereupon he was arrested and called before the queen. The queen charged him with having stolen the horse, whereupon he justified himself by stating that he knew the height of the horse by the fact that the bushes were disturbed up to a certain height; that he knew the horse wore gold shoes by the fact that he had seen a gold scraping in a footprint at the bottom of which was a stone; that he knew the stride of the horse by the distance apart of the hoofprints, and so on. The queen admired his ingenuity and let him off with a fine of some $500.00 and a couple of hundred more which he was compelled to pay in tips to the various officials of the court. He decided that in future when he saw anything out of the ordinary he would keep his own counsel. A few days later, a prisoner

escaped from a building which could be seen from the windows of Zadig's apartment. He heard the noise made by the escaping prisoner—resolutely remained in his room and made no investigation. Notwithstanding, he was brought before the courts, where it was proved that his window faced the window of the prisoner, that by the exertion of his ordinary faculties, he must have seen the prisoner if he had exerted himself to do so, and that he could, with little difficulty, have caused his apprehension, and a heavy fine was imposed upon him for his negligence.

The moral of this is that circumstantial evidence may at times be as damaging to one as beneficial. Let us now take an example of the way in which a proper recognition of the value of circumstantial evidence may be helpful to the claim agent. In a certain town, a street railway for some 300 ft. of its length, crosses a deep ravine by means of a very lofty trestle. The railway ties are fairly close together, but not so close that a human being could not fall between them. A conductor of the road reported on a cold wintry night that a woman and child had descended from his car on the far side of the trestle, stating that they had no money to pay their fare. The following morning the newspapers contained an account of a thrilling rescue of a child by its mother, under these circumstances: The mother claimed that, fainting with cold, she had boarded a car of the railway company near the trestle and had been put off at the middle of the trestle be cause she had no money to pay her fare. The mother and child then began to retrace their steps across the trestle, the mother leading the way. When she had proceeded some distance, she missed the child, a little girl, and turning back, retraced her steps over the trestle on all fours, looking between each tie for some

trace of her little one. Finally she came to the ties between which the child had fallen, and to which it was clinging by one hand. She dragged it to a place of safety and staggered to her home.

That this was a story when told well calculated to inflame the minds of the public against the railway company needs no emphasis. The claim agent of the company, having seen the newspaper reports, proceeded to the scene of the accident to examine the ground. It happened that, preceding the incident related above, there had been a light fall of snow, followed by extreme cold weather. When the claim agent arrived on the scene, he found that a set of footsteps, evidently those of an adult and those of a child, led from the side of the trestle to the middle, where they had turned about and retraced their steps to the place where they had entered upon the trestle and followed on for some distance along a path that followed the line of the ravine. A careful examination of the snow and of the entire ground disclosed the fact that there was nowhere any trace of the snow having been disturbed between any of the ties over which the footsteps led. In addition to this, the footsteps of both persons were continuous to the point where they had turned back. A careful measurement of the footsteps was made, and a pair of rubbers belonging to the child were found to fit exactly the smaller footprints. Witnesses were procured in order to prove that the footsteps were continuous, that the snow had not been disturbed upon the ties except by footprints, and that there was no trace whatever of anyone having fallen between the ties. Besides this, the footprints in the snow showed that the two persons had gone on the trestle from the side of the ravine and had then retraced their steps, making it obvious that

the parties had not begun their walk from the middle of the trestle.

It will be seen at once that by nothing but circumstantial evidence the entire story of the alleged accident had been disproved. If the footprints began at the far side of the trestle, went to the middle and returned, it was obvious that they had not begun at the middle. If there were no marks in the snow beyond ordinary footprints to the middle and back again, it was obvious that no one had fallen through, and if the footwear of the child fitted the footprints in the snow, the proof was reasonably conclusive that the persons presenting the claim were the persons who had made the marks in the snow. It is sufficient to say by way of comment that the investigator must not stop with direct evidence, but must use every effort to get all of the proof that may have any possible bearing upon the circumstances surrounding the accident or other occurrence.

The exact value of stories of fraud or crime can scarcely be determined. Placed in the hands of the ignorant or evil-minded they may do incalculable harm, while they may present invaluable lessons to the discerning mind. The exploits of a Sherlock Holmes may seem to a keen mind no more than the feats of a skilful chess player. The same faculties that foresee the inevitable operation of the mind of a daring and unscrupulous criminal are employed in calculating what move the chess player's opponent will make ten plays in advance. It is, after all, a matter of careful analysis.

But the valuation of evidence is a matter for a careful and trained thinker. That the man who values claims should scrutinize his evidence in just the same way needs no argument.

The great problem is to seize at once what is essential

from what is not. The late Cardinal Newman, one of the keenest of thinkers, summarized the situation exactly when he gave the illustration of two men arguing, each about a different proposition, and each amazed that the other was not convinced.

108. Character of witnesses.

So much for the nature of evidence. The first inquiry toward which attention must be directed is as to the character of the witnesses by whom the facts or evidence are to be proved. The most general classification that one can adopt is whether the witnesses are interested on one side or on the other, or whether they are disinterested. A claimant is an interested witness in favor of himself. His tendency is to make the case look favorable to himself. The driver of a wagon that has caused injury is an interested witness in his own behalf. The testimony of all interested witnesses, needless to say, is to be scrutinized carefully. It should make anyone cautious to accept his statements without corroboration. In cases of this kind it becomes important to increase the number of witnesses. Ordinarily, two good witnesses to an occurrence are as good as a dozen, but so many things may happen, persons may die or move away, that it is well to have as large a number of witnesses as can be obtained.

109. Number of witnesses. Conflicting statements. How to reconcile them.

With increasing numbers of witnesses, the likelihood of conflict between their various statements increases. In such a case, the difficulty of the investigator is greatly enhanced. He must harmonize conflicting statements in his own mind so as to discover if possible just where the truth lies. The best manner to accom-

plish this, is first of all to get a full statement of all of the evidence. It will be found as a rule that they all have some fact or facts in common. Therefore, the first labor in reconciling conflicting statements is to take from all of them those facts that are common and set them down as facts which must be admitted by everybody. From the remaining facts which conflict some will be found to be consistent with the general report of the accident, and some will be found to be inconsistent. If any of the inconsistent facts are in any way absolutely impossible, they may be rejected at once, while the consistent facts may be accepted. In this manner, by gradually eliminating facts that are improbable and those that are impossible, a fair approximation of the true state of facts may be reached. We may illustrate this by a rather broad instance. A lineman at work on a telegraph pole, in some manner, comes into contact with a highly charged wire, and falls to the ground and is injured, but not killed. There are several witnesses of the occurrence. One says that the lineman, whom we will call Smith, ascended the pole, was there for a few moments, that he attempted to put his arm between two wires and immediately he looked as if he had been injured, and fell to the ground. He says that the wires on the pole are the wires of the Ozone Electric Light Company and carry about 300 volts. A second witness says that while Smith was on the pole, a wire stretched across the street belonging to the Globe Electric Light Company and carrying 20,000 volts, fell across the pole wires and struck Smith's arm, and that Smith fell to the ground. A third witness states that he is employed by the Globe Electric Light Company, and that it had no wires in that neighborhood, that he saw the accident, and that no wire had fallen. On an examination of this evidence, it will be

seen that the testimony of the first witness and that of the third witness are in general harmony, while the testimony of the second witness introduced some improbabilities that caused us to regard it with suspicion. To begin with, if Smith had been struck by a broken wire carrying 20,000 volts, he would have been killed instantly. We are, therefore, compelled to believe that the particular wire that Smith touched did not carry a high enough voltage to destroy life, and that his injuries are probably due partly to the shock from the wire and to his fall to the ground. The testimony of the second witness, therefore, must be disregarded. This, as already stated, is a broad instance, but the general method may be pursued, however many the statements are, and however much they conflict. The first step is to select whatever facts are common to all of the statements, and then to eliminate improbable or impossible ones.

110. Claimant's account of accident.

It should be remembered that if the statement advanced by a claimant discloses what may be termed a good cause of action, his own testimony may carry the case to the jury. In the same way, if there is such a conflict that it cannot possibly be reconciled, and some of it indicates liability, and some of it indicates nonliability, there is every reason for believing that the case may go to the jury. The claimant's own statement of the accident always plays an important part in the determination of this question. If his statement is unshaken under the severest examination, if he is firm in it, and evidently believes in it, even if there is testimony against him, he has a good chance to win, and the investigator or claim agent should bear this fact in mind. On considering the somewhat subordinate

factors like medical testimony, it is to be recalled that one of the principal values of the medical testimony is in fixing absolutely the seriousness and extent of the physical injury, and once liability has been admitted, it is the medical testimony that determines in a fashion whether the injuries are permanent or temporary, whether they are the result of trauma, or whether they are pre-existent, or are the natural consequences of a bad family history or a vicious life. Therefore, the medical testimony must be examined with the utmost care.

111. Attendance of witnesses.

Before leaving the subject of evidence something must be said of the means of producing witnesses for the purpose of obtaining their testimony and of the extent to which the testimony of certain individuals must be rejected.

There is one fact that a claim agent should never lose sight of, in the handling of his facts and the preparation of his data, and that is that the claim may become a suit. In that event, everything may depend upon how far he has kept in touch with his witnesses, and of his counsel's ability to reach them when needed. Needless to say, the voluntary attendance of witnesses cannot be depended upon, and the presence of the witness is secured, as every one knows, in general practice, by means of a subpœna. But the probable difficulty of securing the witness in the first instance is a matter with which the claim agent or investigator first becomes acquainted. The character of one's witnesses informs him immediately whether or not it may be difficult to produce them when wanted. Persons in professions, established business or of high standing are almost invariably attached to some particular location, or

have so large a circle of acquaintances that it is comparatively easy to trace their whereabouts. In the case of individuals of less importance, however, the matter is not so simple. Here the claim agent or investigator must be guided by his knowledge of human nature.

For human beings belong to two classes. Men of stability and "birds of passage." The first class we have sufficiently described. The second class presents an infinite variety, both as to their reliability and as to the extent of their wanderings. Trades and occupations have much influence upon the phenomenon of drifting. Journeymen in trades, painting, plumbing, and the like, especially if unmarried, are likely to change residence frequently, through change of employment, while married men with families are less likely to change than single men. The location in a city must also be considered, the poorer sections of the cities containing generally a population that may be termed floating or mobile. In the case of a witness, poor and with no occupation or ambition, the question of locating him, once he has been lost sight of, is purely a matter of chance.

112. Veracity of witnesses.

Elaborate works on logic sometimes devote chapters to the calculation of chances. When the man in claim work begins to deal with the veracity of his witnesses, he will make as elaborate a calculation of chances as human experience holds. The same tests are applied here in a sense as in fixing the reliability of one's witnesses, and experience is the only school in which one learns to discriminate between witnesses who may be trusted and those who may not.

113. Competency of witnesses.

The general rule now obtains, with few exceptions, that practically all persons are competent as witnesses. Persons convicted of perjury are not usually competent, nor may husband and wife, except in a few limited cases, testify against each other. Insanity and extreme youth also are disqualifications.

Certain persons are disqualified from testifying because of their peculiar confidential relationship to the litigants. Lawyers cannot testify to matters confided to them by their clients, and generally speaking, doctors or clergymen cannot be compelled to divulge matters revealed to them in their professional capacity.

CHAPTER IX

LITIGATION. FACTORS AND EFFECTS

114. Basis of settlement of litigation.

One of the reasons for settling the claim of a person injured through our negligence, is that in a sense, we are his debtor. If we have deprived him of his health or of his limbs, we are under the highest obligation to compensate him. The second reason is, that litigation of this kind, which is so enormous in bulk and so baleful in its effect upon the moral life of a community, should be avoided. This effort to avoid litigation results in a sort of bookkeeping in which the cost of litigation is one entry on the ledger, and nominal settlements the other. Even where a claim is somewhat doubtful in merit, if it has any foundation at all, it is generally considered wiser to make a nominal settlement than to invite litigation. Let us consider first of all, a doubtful case of liability where the injuries are extremely severe. In general, such a case calls for settlement if it can be done at a reasonable figure, by reason of the very dangers arising from the doubtful issue of litigation. Where the injuries are trifling and the amount involved small, it is usually considered better to adjust a claim than to waste the time and effort of able counsel upon trifles. Again, the adjuster of each company has his finger more or less upon the pulse of the juries of his com-

munity. There are some communities where the fact that the defendant is a corporation and particularly a railway corporation is in itself sufficient to double a verdict. Where this is the case, the adjuster cannot be too careful which cases he permits to develop into litigation.

115. Verdicts previously rendered in similar cases.

To a certain extent, the verdicts previously rendered in similar cases afford him a test of how much should be paid in the case under discussion. An effort has been made in various communities by the legislatures to fix certain amounts as the damages allowable for personal injuries. For example, it was provided by one statute that for injuries due to negligence resulting in death, no larger sum than $5000 could be awarded in damages. It was further provided that where the injuries did not result in death, the maximum sum to be recovered should be $3000. This law has generally been disapproved and in many cases has been held unconstitutional. Some state constitutions as a matter of fact forbid the passage of any such acts. Many of the new Employer's Liability acts, however, limit the amount that can be recovered against the employer, because in most cases the employee has the privilege of suing, as at common law, and therefore his right to recover whatever damages he may sustain remains unimpaired.

116. Possibility of making new law.

Litigation performs a certain useful office in fixing standards of care that must be observed. The public generally is then informed that it too, is bound to exercise care and that unless it conforms to the ordinary standard of watchfulness it cannot ask damages if hurt.

The claim agent or adjuster must therefore consider the possibility whether his case is on what may be termed the border line of making new law. If it had not been for this attitude, such cases as the Pennsylvania case of Thane vs. The Traction Company, which settled the principle that it was contributory negligence for a passenger to ride on the platform of a car when he might have gone inside, would never have become law. If the case is one in which, for the protection of defendants under similar circumstances, a higher standard of care on the part of the claimants should be enforced, then the claim agent, before determining the value of his claim, must consider also the possibility of establishing an important point of law in his favor. It may be settled as a principle that continued substantial verdicts affect a community badly. They increase litigation by exciting the cupidity of unscrupulous claimants. They increase the likelihood that juries will go beyond the point of reason in awarding heavy damages against a corporation defendant. The same principle applies if the defendant is a wealthy or supposedly wealthy individual or partnership. The rule generally is to avoid, if possible, any danger of an extreme verdict.

It must be remarked that where the law leaves a claimant to his common law remedy, and at the same time provides him with an alternative remedy, where the amount of his recovery is limited, the claimant is bound by his choice of the one or the other form of action.

117. Non-suits.

It must be recalled that in the United States and England, where the judge determines questions of law, and the jury determines questions of fact, the plaintiff

or claimant being represented by one lawyer and the defendant by another, a trial of an action at law, an action to recover for personal injuries, for example, has come to be regarded as a sort of duel between the two lawyers, in which a close case may be decided one way or another, according to the cleverness of either lawyer.

The danger of having a case of severe personal injuries go to the jury is one with which every claim agent has been made familiar by sad experience. The only hope of averting disaster in such a case is by securing a non-suit. A non-suit is the judgment of the court, when the plaintiff has submitted all of his evidence, that the plaintiff has not proved his case, or as it is put technically, has not made out a prima facie case, say of negligence. This may be made clearer by illustration. If the investigation in the hands of the claim agent has developed irrefutable proof that the claimant was hurt in trying to board a rapidly moving car, the claim agent may conclude at once that he has nothing to fear from litigation and that his counsel will be able to secure a non-suit. This is a conclusion sometimes fraught with danger for this reason.

The number of cases in which the question to be decided is negligence or non-negligence, liability or non-liability, is extremely great. It forms an entirely unjustifiable proportion of all litigation, and the blame is hard to place. It may be ascribed in part to the feverish haste with which all modern activities are performed. The result is an enormous number of decisions that cover almost every conceivable phase of mishap. From this it is apparent that a careful study of decisions in point will inform a claimant or his lawyer what they must prove in order to pass through the Scylla and Charybdis known as a non-suit. The un-

scrupulous claimant has been known to ask his lawyer before telling his story what he must prove to win his case, while every large city boasts a certain number of lawyers against whom a non-suit can practically never be obtained.

Let us illustrate the matter further. A decision is handed down by the Supreme Court in these words: "It is the duty of every person about to cross a railroad track to stop, look, and listen, before attempting to pass over." A claimant hurt at a railroad crossing will often declaim in an almost verbatim rendering of the decision, "Before I attempted to cross the railroad tracks I stopped and looked and listened." In a recent case a claimant testified, "As I approached the first line of tracks I stopped my team and before crossing the second track looked in both directions." The trial judge looked keenly at the witness for a moment and then said, "You have made a slight mistake in your testimony." The witness replied, somewhat confused, "In what respect?" The judge said, "You have used the word 'crossing' where the Supreme Court said 'entering.' Throughout the trial the claimant had given his testimony in the exact words, with that exception, of the Supreme Court in a similar case, decided in favor of a plaintiff. That the biting sarcasm of the judge was justified, needs no comment.

So that the possibility of a non-suit is by no means a sure guide in the handling of a claim, or for the present purpose, in passing upon its value.

CHAPTER X

Fraud

118. Evil tendencies of the practice.

The element of fraud, premeditated or otherwise, in connection with the presentation of claims or suits for damages against defendant corporations, has in the past proven of too serious moment to justify our passing over a subject so fraught with evil consequences without commenting at some length upon the various forms and

directions in which this nefarious practice has made itself manifest.

119. Subject to be approached with unbiased mind.

In weighing testimony, as has been stated, with a view to determining the reasonableness and accuracy of its component parts, it is essential that the investigator or adjuster should approach his subject with an open and unbiased mind, for it does not necessarily follow that fraud is present merely because certain portions of the evidence may appear to be contradictory or inconsistent with the preponderance. Nor should fraudulent intent be too hastily imputed to a witness or claimant even in cases where his or her statements stand alone, without support or corroboration, and clearly in open conflict with the entire mass of evidence. Allowances should be made for the possibility of honest mistakes, as well as certain natural differences of opinions, before we place upon one the serious and far-reaching charge of fraud. The exercise of reasonable moderation in arriving at conclusions upon matters of this nature in advance of conclusive evidence of guilt is rightfully due both parties to the controversy.

120. Prompt action if fraud is present.

Once the fact is evident, however, that intentional efforts are being made to mislead or to deceive the defendant with respect to essential features of the case, no energy or expense should be spared in uncovering the perpetrators of the fraud. Prompt, decisive measures should immediately be adopted, and every proper method pursued to run the conspirators to earth. In this effort, if wisely directed, the defendant cannot but have the hearty support and approbation of every right-thinking person.

121. Classification of fraud.

Passing then to a consideration of the subject proper itself, we find that fraud in this particular connection naturally classifies itself into two distinct divisions, *i.e.*, *a*. deliberate, premeditated fraud, and *b*. incidental or casual fraud. The former frequently carries with it what may be termed criminal intent, oftentimes without regard for possible consequences. The latter, while not so openly vicious in character, doubtless is the more insidious in its effects, largely exceeding the former as it does in numbers, and constituting thereby a problem of relatively greater proportions when considered in the aggregate.

122. Premeditated fraud.

Premeditated fraud, as herein before described, may be predicated upon the actual occurrence of an accident or other cause of action, or it may be founded upon an alleged incident which really has no existence in point of fact. Instances of each of these classifications are too numerous in the experience of those conversant with claim work to necessitate illustration. Suffice to say, the exercise of skilled methods of the highest degree oftentimes are necessary to successfully combat the pernicious tendencies of claimants so evilly disposed.

Fortunately the fraudulent nature of no inconsiderable proportion of claims and suits of this character is comparatively easy of detection because of the unusual lengths to which those directly concerned resort when hard pressed in their efforts to strengthen their case. Many fall of their own weight when put to the test of investigation, while others crumble like a house of cards immediately the searchlight of publicity is turned in their direction. Still others prove more difficult of solution because of their having been constructed by

hands more skilled and experienced in this nefarious calling. Without principle or morals, in open defiance of all recognized distinctions between right and wrong, and actuated solely by greed, individuals of this type demand the sternest repressive measures provided by law once their intentions have been bared to public view. And in thus exposing malefactors of this school a concern not only protects its own interests against unlawful invasion, but discharges as well a public duty toward the whole people of a community.

123. Casual fraud.

Incidental or casual fraud in the claim field implies a lesser degree of taint, yet offers even greater scope and elasticity, while at the same time proving more difficult of exposure, if not of detection. Instances strongly presumptive of fraud are of almost daily occurrence in the annals of large concerns, yet baffle exposure oftentimes unless aided by some fortuitous circumstance. It is in cases of this character that the skill and experience of the investigator is tested to the utmost in his efforts to arrive at an accurate determination of the precise facts surrounding the circumstances in dispute. Here it is that the old axiom of the law "false in one, false in all," not infrequently stands forth as a beacon light in the investigation and consideration of cases of this particular nature. More often than not the first presumption of fraudulent intent is forcibly presented by a statement palpably false, and which, when supported by other allegations of like nature, admits of but one conclusion.

124. Complexity of the situation.

It is then to a situation pregnant with myriad complexities that we must address ourselves in considering

the almost limitless forms in which fraud, in some degree at least, may present itself for the contemplation of him to whom is assigned the responsibility of arriving at a proper determination of the probable facts in any given case. It is not to be presumed that in all cases he will be able infallibly to detect the presence of fraudulent intent, nor always to mete out proper punishment to the deserving; but it is to be expected that he shall be ever alert to the possibilities of the situation, and that he will act with promptness and dispatch whenever circumstances shall seem to warrant decisive action upon his part.

While fraudulent intent may at times manifest itself in connection with claims for property damage, it is rather with its relationship to personal injury claims that we shall concern ourselves at this time. Attempts to deceive with respect to the former, usually operate in the direction of exaggerating values, which, in the last analysis generally are subject to certain recognized standards of valuation which aid materially in holding in check ambitious efforts to pad claims of this character. It is not difficult to appraise the approximate damage done to an automobile, carriage, horse or other piece of property. Personal injury claims, however, are susceptible of no such standards of comparison, and offer, therefore, greater possibilities to claimants of easy conscience.

125. Manufacture of evidence.

The manufacturing of evidence, either in whole or in part, is not always monopolized entirely by claimants themselves, for others interested in the success of the undertaking occasionally lend material aid, sometimes even without the knowledge or consent of the principal. A case in point occurred some years ago wherein an

elderly gentleman, while walking along a lonely road at night, was struck by a passing vehicle and was left lying upon the road in an unconscious condition. Unscrupulous relatives seized upon the occurrence as a means of levying tribute upon two separate and distinct concerns whose delivery wagons traversed the scene of the mishap, and actually succeeded in securing a reasonably substantial settlement from one of them upon the strength of statements furnished by certain alleged witnesses to the affair. Yet none were more genuinely astonished than the old gentleman himself when the fraudulent nature of the evidence was exposed by a subsequent investigation which was instituted by one of the two concerns.

In the great majority of cases, however, wherein fraud plays any considerable part, it is reasonable to suppose that the claimant himself, either directly or indirectly, lends his aid and consent to the project. He thus knowingly forms the keystone to his own arch of fraud, and renders possible oftentimes the guilty participation of others.

126. Exaggerated statements.

In considering this phase of our subject, it may not prove amiss at this time to make a distinction as between claimants whose statements are exaggerated or colored, or influenced to some extent by an instinctive desire to strengthen their cause and those whose irresistible desire it is to win, irrespective entirely of actual facts. In other words, one takes the garment as it actually exists and effects certain material alterations; the other in a sense cuts the cloth to suit his own individual pleasure, without regard to any considerations whatsoever of honesty or of principal. While the intent of each is much the same, and the results oftentimes are

not markedly dissimilar in their extent, still upon reflection it will be seen that of the two, the methods pursued by the latter are the more reprehensible because of the more clearly defined criminal instinct displayed. In individual cases, reasonable allowance may occasionally be made for the former; for the latter slight consideration need ever be shown.

127. The legal profession.

The rôle played by certain types of attorneys-at-law in conjunction with matters of this sort, offers wide latitude for discussion. To quote from the Spectator "much may be said upon both sides." Nothing of any real value, however, can arise out of intemperate denunciation of all members of the bar who may knowingly or otherwise, lay themselves open to criticism upon this score. It clearly would be absurd to attack the profession as a whole merely because of the unethical practices of the few. Time and patience doubtless will bring forward a just and equitable solution of this rather perplexing problem.

128. The medical profession.

The situation is somewhat the same within the medical profession, though candor compels us to admit that laxity here is somewhat more widespread than is true of the law. With the latter, there are certain restraining influences which have a deterrent effect upon the more venturesome. Cognizant of this advantage, a certain element within the field of medicine and surgery not infrequently furnish evidence of a disposition to exceed the bounds of reason and of good judgment in the lengths to which they ofttimes go in their efforts to bolster up tottering claims. It is indeed difficult to reconcile the hopeless prognoses so often painted in

court by certain physicians, with the startlingly prompt recoveries made by their patients once a satisfactory judgment has been secured at the hands of a jury. It is beside the question to attempt to account for such conditions upon mere abstract theories based upon the uncertainties of health and life. The frequent recurrence of such incidents lead to but one of two conclusions, either the insufficient training and experience of the physician, or else deliberate, premeditated fraud.

In considering the probable value of a claim, due weight must necessarily be given to the physical condition of the claimant as alleged by the attending physician, and likewise to such facts as may be disclosed by the examination of the defendant's surgeon. Obviously, greater weight will attach to the opinions of attending physicians who evince a disposition to be fair-minded, frank, and sincere, than to those who incline toward secrecy, hypocracy, and deception, however adroitly they may endeavor to conceal their real attitude. Fair treatment begets fair treatment. It is only the narrow in mind and spirit who shut their eyes to so patent a fact.

129. Location as affecting fraud.

Experience in claim work, more especially in the populous centers, seems to establish certain fixed principles which in a measure appear to have a direct bearing upon the probability of deception being attempted in the presentation of claims against public service corporations. For example, the ratio of suspicious cases in certain specified localities within a given area oftentimes is much higher than is true of other districts immediately adjoining. Again, the racial traits of certain people undoubtedly have their influence, while even the character of occupation not

infrequently seems to inculcate in claimants a readiness to resort to questionable tactics in their efforts to collect damages for an alleged injury, real or fancied. From this it is not to be inferred that fraud always is present in every instance of this character, for such, of course, is not the case. They constitute, however, the culture medium upon which thrives the germ of fraud.

130. Boarding and alighting accidents.

Again, certain reasonably accurate deductions may be drawn along this line from among the various types of accidents which occur with greater or less frequency. For instance, in electric railway circles, the boarding and alighting type of mishap easily takes front rank as a prolific source of misrepresentation. A passenger negligently attempts to board or to alight from a car which is in motion. Miscalculating the speed at which the car is traveling, he is thrown and injured. At the moment and in the presence of eye-witnesses to the occurrence, he is not sufficiently presumptuous to openly claim a premature start, which would imply negligence upon the part of the conductor or motorman in charge of the car. Yet the following day finds no such hesitancy upon his part. From then on, the conviction becomes stronger within him each day that his injuries were received as a direct result of the negligence of the crew in starting the car prematurely. Cases of this nature are too generally known and well understood to require extended comment.

131. Nature and extent of injury.

The nature and extent of an injury, together with an approximation of the probable period of total or partial disability, opens up a field of tremendous possibilities to the fraudulently inclined. In dealing with eventualities

opinions naturally differ, and thus it is that men of little real skill or ability oftentimes are afforded an opportunity of masquerading under the guise of apparent respectability in setting off their opinions against those of men intellectually and professionally their superiors. The combination of a van-dyke beard and several years' limited experience in the practice of medicine sometimes produces results most startling in prognosticating the ultimate effects of injuries sustained in actionable mishaps.

132. Severity of injury.

It is to be expected, of course, that the severity of an injury will lose nothing in the telling by the one most concerned. This practice has become so universally recognized that proper allowances usually are made without any thought of intentional fraud necessarily being imputed to the claimant. If, however, the subsequent course as pursued by the claimant, or his family or representatives, gives evidence of a continuation of this apparent effort to deceive, then the entire matter forthwith becomes proper material for the closest scrutiny at the hands of the investigator or adjuster. In other words, allowances may be made in claim work for the frailties of human nature, but not for its deliberate misdeeds.

133. Mystery surrounding a claim.

We have never been able fully to understand the motives which actuate certain claimants, or their professional representatives, in surrounding their case with an impenetrable wall of secrecy and mystery, providing, of course, that there is nothing of a questionable or hazardous nature about their own actions in the premises. Such tactics, in a measure, are of themselves

presumptive of guilt. Granting for the moment that such conduct does not necessarily imply intentional deception, it nevertheless is equally true that identically the same methods are pursued *in toto* in practically all cases wherein deliberate, premeditated fraud is to be attempted.

Passing then to a consideration of certain additional features of claim work which afford still further opportunities for the introduction of fraud, we may summarize a portion of them under the caption of "Attempted Concealments."

134. Attempted concealments.

The first of these may be designated as "previous physical condition." It must be apparent, even to the lay mind, that the existence of an injury or disease prior to the occurrence of the mishap under consideration may be of the most vital importance in attempting to determine the extent to which each may have contributed its share toward the present physical condition of the claimant. The question at issue now is not whether the present injury may not have aggravated a former ailment, but rather a direct attempt upon the part of the claimant to conceal even the existence of a former condition and thus to enhance, if possible, the value of whatever legitimate claim for damages he may now possess as a consequence of the present injury.

By way of illustration take the case of a suppositious claimant who has entered suit for damages, alleging that tuberculosis developed as the result of a blow upon the chest which he received in a collision between cars of the defendant company. In the interval before trial, the disease has made considerable progress and the chances for ultimate recovery are not especially promising. The claimant insists that prior to the

accident in question, he had enjoyed excellent health, and ascribes his present illness entirely to the violent blow received in the collision. Upon investigation, however, it develops that he had been threatened with lung trouble for a space of several years before the collision, and that six months previous to that date he had been obliged to give up his position as a baker and to seek outside employment. It furthermore was learned that for over a year previous to this, he had been receiving regular medical treatment in an effort to arrest the progress of the disease.

Such cases are of almost daily occurrence with many concerns. Sometimes the deception takes one form, sometimes another. Though it is entirely possible that a recent injury may have aggravated a former condition, it is idle to argue that attempted concealments of this character are anything other than a distinct phase of premeditated fraud.

135. Previous accidents.

Closely allied to the former and oftentimes of equal importance, is the question of a "previous accident," together with its resultant claim for damages and possible adjustment. It does not necessarily follow, of course, that a former mishap need have any direct bearing upon a subsequent injury, but the mere fact of a claimant's attempting to conceal its existence may fairly be regarded as furnishing reasonable grounds for proper investigation with a view to determining just what influence, if any, it may have upon the present state of facts.

136. Professional claimants.

It may be said without bias that claimants are occasionally encountered who are not averse to being

reimbursed a second and in some cases even a third time for precisely the same injury. With respect to "professionals," of course, the same injury, whether real or assumed, is sometimes traded upon repeatedly until eventually the fraudulent character of the claimant is exposed and his activities curbed. Few "professionals" successfully operate for any considerable length of time nowadays, because of the thoroughness with which most concerns scrutinize the statements of claimants which upon investigation are found to contain "concealments." The latter are looked upon as a presumption of fraud, in some degree at least, until the contrary is proven.

137. Deliberate concealment.

Another point which may be noted in passing is the fact that the liberal adjustment of claims not infrequently serves to arouse latent ambitions in claimants of a certain type. Superficial investigations and unbusinesslike methods of adjusting claims aid very materially in recruiting the ranks of professional litigants. Deliberate "concealments" necessarily form no inconsiderable part of the stock in trade of these people, once they enter upon deception as a means of gaining a livelihood. The necessity, then, of giving proper consideration to the possible effects consequent upon the occurrence of a previous accident will readily be apparent.

In like manner attempts to conceal the actual whereabouts of a claimant, as occasionally attempted, may properly arouse suspicion as to the good intentions of those immediately concerned. Change of scene, the advantages of different surroundings, and freedom from annoyance usually are assigned as reasons for adopting such a course. But why the secrecy and mystery of

the proceedings? Surely no responsible concern whose affairs are in the hands of reasonable, fair-minded men of intelligence would desire seriously to retard the speedy recovery of a claimant, to its own detriment. If experience in investigating cases of this nature teaches us anything, we fear that we shall have to look elsewhere oftentimes for a sufficient explanation.

138. Substituted claimants.

Somewhat analogous to this, though less frequently attempted, is the hazardous subterfuge of substituting another for the claimant in physical examinations intended to determine the nature and extent of the injury. This daring expedient was successfully resorted to, for a limited space of time some years ago, by an organized band of conspirators in one of the largest cities of the east. It appears that the principal acrobat of the coterie, all of whom were women, would intentionally throw herself from a car at an opportune moment, and would then insist upon being removed to her home, usually in an ambulance. A claim would then be presented to the company, and a physical examination of the claimant speedily followed. Following this examination her place in bed was promptly taken by another member of the band who would attempt to negotiate a settlement, the former meanwhile returning to her work upon the firing line. Her next effort would take place in a distant part of the city and consequently in the territory of a different examiner and adjuster. Again, she would be removed to the quarters of still another member of the party, who in due time would substitute for her, following the customary physical examination.

The suspicions of the company in question were shortly aroused by the similarity of the mishaps, and

after the band had been permitted to continue their operations for a sufficient length of time to insure convictions, the string was pulled, and the entire outfit sent to the penitentiary for varying terms of imprisonment.

139. Fraud as to earning capacity.

The earning capacity of claimants has for many years proven fertile ground for the propagation of fraud. The frequency with which attempts are made to conceal the real facts in this respect, with a view to enhancing the value of claims, no longer excites surprise or indignation in the mind of the experienced adjuster. Constant association with this condition rather inclines him to look upon the practice as a matter of course.

The really affluent circumstances of the proprietor of the fruit stand just around the corner, who was popularly supposed to be living from hand to mouth, were never suspected until he chanced to meet with a mishap. The fact of his having attempted upon several occasions to dispose of the good will of his business at a figure of something less than $600.00, seems not to deter him in the least from attempting to show regular annual profits of several thousand dollars from the enterprise.

The milliner, further down the street, whose credit long since has been regarded with suspicion, suddenly discovers that for several years past her net income has really been in excess of her wildest dreams. Clerks temporarily become assistant managers at greatly increased salaries, while all manner of contingent profits, benefits and advantages are inflated for the occasion and brought forth for the inspection of the claim adjuster.

In seeking a fair and reasonable approximation of the loss sustained in this direction, the adjuster must rely

in some measure upon the exercise of good common sense. Not infrequently the circumstances are such as to preclude the possibility of his securing a reasonably accurate estimate of the probable loss, however thorough may be his investigation. In such cases experience and good judgment must determine his course.

140. Past history or reputation.

Claimants occasionally find it to their advantage to attempt to conceal their past history or reputation. In some instances they doubtless possess most excellent reasons, from their point of view at least, for so doing. Especially applicable is this to the cases of "professionals, repeaters, and floaters." The many index bureaus, both local and national, which have been established throughout the country within recent years have done much toward restricting the activities of this class of claimant.

141. Difference of communities.

As may be expected, there are certain well defined distinctions in fraudulent claim work, as evidenced in different communities. This fact is not always fully appreciated, even by men of years experience in the work, if their efforts have been confined principally to some particular city or section. In some instances, therefore, deception is more difficult of detection than in others, requiring oftentimes radically different methods of procedure in its uncovering.

By way of illustration, it is generally conceded that the larger the community, the greater the proportion of fraud, especially deliberate, premeditated fraud. Whether country-bred folk are, as a whole, more honest and truthful than their city brethren, we do not presume

to say, but it will invariably hold true, as a general proposition, that claims as presented by the former are more uniformly truthful and accurate as to details than may be said of the latter. The one desires only that he may be made whole. The other seems disposed to regard his claim rather in the light of an investment, with the sky as a possible limit.

In some few cases the people even of an entire state exhibit a noticeably different attitude toward such matters, as compared with the residents of other states. Not that there is any marked increase in the ratio of fraudulent claims as compared with honest, legitimate ones, but rather because of the universality of its people in the direction of exaggerating essential details in presenting claims and suits for damages for personal injuries. In other words, illustrations of what we have termed casual or incidental fraud. Many causes doubtless have contributed their share toward engendering this condition, but the liberality of juries and of legislators, as well as a noticeable hesitancy upon the part of the courts to discourage incipient fraud, unquestionably have each had its effect upon the public mind.

142. Difference of occupations.

It is of peculiar interest to note that to a certain limited extent, certain occupations or callings seem to be more productive of fraudulent claims than do others. Association, presumably, in large measure accounts for this peculiarity. This tendency may vary as between one community and another, and while the principle involved is not susceptible of any inflexible rule, the distinction nevertheless is one which is generally recognized, consciously or otherwise, by practically every investigator and adjuster of any considerable experience.

143. Natives of different countries.

Distinctions of a more sharply defined character with respect to the subject of this chapter are to be found among the natives of other countries who have selected this as their future home. It has been humorously observed that emigrants frequently land at Castle Garden, whose sole possessions consist of a bland smile, and a pencil and notebook for the securing of witnesses. Suffice to say, their unfamiliarity with the laws of motion not infrequently deprives them temporarily of the former, and affords them early opportunity to make use of the latter.

Yet, in some instances, the racial traits of certain of these people have had a directly contrary effect, their scrupulous regard for honesty and truthfulness auguring well for their future worth as citizens of the country. In justice to many not similarly disposed, however, it must be admitted that the example set them at times by the home talent, unfortunately, may have given them a false idea of the proper order of things.

144. Conclusion.

These, then, constitute additional features to which proper consideration necessarily must be given, in their proper sphere, in attempting to determine the approximate value of a claim. If fraud is present, its nature and extent, as well as its probable effect upon the possible value of the claim, if any there be, obviously are factors of most vital importance. Once the existence of fraud has been established with reasonable certainty, it then is in order to ascertain whether the circumstances are such as to render recourse to the courts advisable, with the object in view of securing indictments against those responsible for the attempted fraud, in which case the entire matter then properly comes within the jurisdiction of the legal department for final disposition.

CHAPTER XI

CONCLUSION

145. A claim as a problem.

We have now considered the principal factors that influence claim values. To the claim agent or adjuster, a claim, aside from its sentimental aspect is a problem, differing from all other problems in the instability of the human factors that determine its value. It is common knowledge that, as the parts of a well adjusted machine fall naturally into place, without strain or great force, some men fall naturally into the duties of their calling, welcoming great difficulties as opportunities to prove their worth. This may be genius or talent, and such men often know by instinct what others must be taught. Nevertheless, the great teacher who supplies to a certain extent the lack of genius in claim work, is experience, combined with an effort to learn. Part of the experience and part of the learning we have endeavored to supply.

146. Accurate reasoning as an asset.

The most important quality, the one that alone enables the claim agent or adjuster to deal with so varied a field of endeavor, is the facility of reasoning quickly and accurately. If this sounds elementary and simple, let any one try to think of ten people of all his acquaint-

ances who can perform this simple feat. It is this facility at work upon the facts, the law, the damages, that enables the experienced man to handle claims with satisfaction to his employer, and generally without earning the enmity of claimants or of his opponents. The claim, as we have seen, consists of three elements: Facts, law, and damages. It has been our purpose to indicate the proper method of dealing with these elements.

147. Fair treatment of claimant.

It must be apparent to those who have gone with us in this little journey toward determining the value of a claim, that we have in a sense, handled delicate subjects without gloves. Let it be understood, therefore, that the object of this book is not to furnish anyone with material for avoiding the payment of his just debts or obligations. A claimant who has received a bona fide injury and has presented an honest claim, should be dealt with in the spirit in which the claim is presented. His debt is one to which is attached as high a moral claim as exists. If the claim agent or the adjuster expects fair dealing from those who present claims to him, it is needless to remark that he is bound to maintain an equally high standard of fairness himself; if anything, his honor, his system of ethics should be higher than that of those with whom he comes into contact. The real function of a claim agent is to apportion to claimants, fairly and equitably, that to which they are rightfully and justly entitled. His is the duty of placing a monetary value upon human pain and suffering.

In so far as has been possible, the information given has been made concrete and definite. The subject obviously is one, however, which is not susceptible of

arbitrary standards or measures of damage which may fixedly be applied to particular types of injuries and with uniformity to all communities. Much necessarily must depend upon one's individual experience and viewpoint. If, therefore, our work stimulates interest and discussion, the authors will rest content.

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